DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-948
Title: CompuCredit Corporation, et al., Petitioners
v.
Wanda Greenwood, et al.
Docketed: January 25, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-15906)
Decision Date: August 17, 2010
Rehearing Denied: October 27, 2010
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 24 2011	Petition for a writ of certiorari filed. (Response due February 24, 2011)
Feb 9 2011	Order extending time to file response to petition to and including March 28, 2011.
Feb 24 2011	Brief amicus curiae of Consumer Data Industry Association filed.
Feb 24 2011	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Mar 28 2011	Brief of respondents Wanda Greenwood, et al. in opposition filed.
Apr 13 2011	DISTRIBUTED for Conference of April 29, 2011.
Apr 13 2011	Reply of petitioners CompuCredit Corporation, et al. filed. (Distributed)
May 2 2011	Petition GRANTED.
Jun 13 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including June 23, 2011.
Jun 13 2011	The time to file respondents' brief on the merits is extended to and including August 8, 2011.
Jun 23 2011	Joint appendix filed.
Jun 23 2011	Brief of petitioners CompuCredit Corporation, et al. filed.
Jun 28 2011	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondents.
Jun 28 2011	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioners.
Jun 30 2011	Brief amicus curiae of Consumer Data Industry Association filed.
Jun 30 2011	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Jul 19 2011	SET FOR ARGUMENT ON Tuesday, October 11, 2011.
Aug 2 2011	CIRCULATED.
Aug 8 2011	Brief of respondents Wanda Greenwood, et al. filed. (Distributed)
Aug 11 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)

Aug 11 2011	Record from U.S.D.C. for Northern District of California is electronic.
Aug 15 2011	Brief amicus curiae of American Association for Justice filed. (Distributed)
Aug 15 2011	Brief amici curiae of AARP, and National Senior Citizens Law Center filed. (Distributed)
Sep 7 2011	Reply of petitioners CompuCredit Corporation, et al. filed. (Distributed)
Oct 11 2011	Argued. For petitioners: Michael W. McConnell, Washington, D. C. For respondents: Scott L. Nelson, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

10-948 JAN 24 2011

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No. 10-

IN THE

Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
Petitioners,

v.

WANDA GREENWOOD *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are subject to arbitration pursuant to a valid arbitration agreement.

PARTIES TO THE PROCEEDING

Petitioners are CompuCredit Corporation and Synovus Bank. CompuCredit Corporation was a defendant-appellant below. Columbus Bank and Trust Company, also a defendant-appellant below, is now known as and is a division of Synovus Bank, a petitioner in this case.

Respondents are Wanda Greenwood, Ladelle Hatfield, and Deborah McCleese, named plaintiffs below, on behalf of themselves and others similarly situated.

RULE 29.6 DISCLOSURE

CompuCredit Corporation is a wholly owned subsidiary of CompuCredit Holdings Corporation, a publicly held corporation.

Synovus Bank is a wholly owned banking subsidiary of Synovus Financial Corporation, a publicly held corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 615 F.3d 1204, and is reprinted in the Appendix to the Petition ("App.") at 1a-29a. The opinion of the district court is reported at 617 F. Supp. 2d 980, and is reprinted at App. 30a-45a.

JURISDICTION

The court of appeals issued its decision on August 17, 2010, and denied a petition for rehearing and rehearing en banc on October 27, 2010. App. 46a-47a. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are reproduced in the appendix. App. 48a-64a.

INTRODUCTION

The court of appeals' decision in this case creates a square and acknowledged conflict among the circuits on whether claims brought under the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.*, are subject to arbitration. A divided panel of the Ninth Circuit held below that Congress intended to preclude arbitration of CROA claims, and manifested its intention with sufficient clarity to over-

come the strong federal policy favoring arbitration. That decision, as the panel below expressly acknowledged, directly conflicts with decisions of the Third and Eleventh Circuits. The question presented is a recurring and important one. And the class-action nature of many CROA claims will enable forum shopping to avoid arbitration, such that the Ninth Circuit's rule prohibiting arbitration of CROA claims would become a de facto nationwide rule. This Court's review is warranted.

STATEMENT OF THE CASE

1. a. The Credit Repair Organizations Act (CROA) was enacted "to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services," and "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations." 15 U.S.C. § 1679(b). The CROA defines a "credit repair organization" as an organization that provides services aimed to "improv[e] any consumer's credit record, credit history, or credit rating." *Id.* § 1679a(3)(A)(i).

The CROA prohibits certain practices by credit repair organizations deemed by Congress to be unfair or deceptive. *Id.* § 1679b. The statute also affords consumers of credit repair services additional rights, such as the right to cancel a contract with a credit repair organization. *Id.* § 1679e.

b. The CROA requires credit repair organizations, before entering into any agreement with a consumer, to provide a written statement disclosing to consumers certain of the "rights" afforded under

the CROA and related statutes. *See id.* § 1679c. The disclosure provision does not itself enact any of the "rights" subject to the disclosure requirement; rather, each of the rights is separately established in other provisions. *See Rex v. CSA-Credit Solutions of Am., Inc.*, 507 F. Supp. 2d 788, 799 n.5 (W.D. Mich. 2007) (linking each of the "rights" required to be disclosed to consumers under Section 1679c with the separate provisions establishing those rights).

Of particular salience, the disclosure provision prescribes that the written statement to consumers state: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." *Id.* § 1679c(a). The "right to sue" described in Section 1679c(a) is found in CROA's civil liability provision, which states: "Any person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount determined under a framework set forth in the statute. *Id.* § 1679g.

Finally, the CROA contains an anti-waiver provision. Entitled "Noncompliance with this subchapter," the anti-waiver provision states: "Any waiver by any consumer of any protection provided by or any right of the consumer under" the CROA "shall be treated as void," and "may not be enforced by any Federal or State court or any other person." *Id.* § 1679f(a).

2. The Federal Arbitration Act (FAA) provides that an agreement to arbitrate a dispute "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has

long recognized, the FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

3. Petitioner CompuCredit marketed and serviced a credit card under the brand name Aspire Visa. App. 3a. Petitioner Synovus Bank (known at the time as Columbus Bank and Trust) issued the Aspire Visa card. App. 3a.

Respondents each applied for and received an Aspire Visa card. Before obtaining the card, respondents agreed that any dispute arising from or related to their credit card account would be arbitrated. In particular, respondents received a mailing entitled "Pre-Approved Acceptance Certificate," which stated, *inter alia*:

> By signing, I request an Aspire Visa card and ask that an account be opened for me. . . . I have read and agree to be bound by the "Summary of Credit Terms" and "Terms of Offer" printed on the enclosed insert, *which insert includes a discussion of arbitration applicable to my account, and is incorporated here by reference.*

App. 4a (emphasis added).

The "Summary of Credit Terms," in turn, provided:

> Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to

> your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, *will be resolved by binding arbitration* . . . . Upon such an election, *neither you nor we will have the right to litigate in court the claim being arbitrated*, including a jury trial . . . .

App. 5a (emphasis added).

4. On October 24, 2008, respondents filed a complaint against petitioners alleging, among other things, that the imposition of certain fees associated with the Aspire Visa card violated the CROA, and that petitioners failed to make certain disclosures required by that statute.[1] App. 3a-4a. Respondents purported to represent a nationwide class of holders of the Aspire Visa card. App. 36a.

a. On December 30, 2008, petitioners moved the district court to compel arbitration of respondents' CROA claims based on the mandatory arbitration clause in the parties' contract. The district court denied the motion to compel arbitration, holding that CROA claims are not subject to arbitration. App. 30a-45a.

The district court acknowledged the need under this Court's decisions to assess the arbitrability of CROA claims "with a healthy regard for the federal policy favoring arbitration." App. 41a (quoting *Gilmer*, 500 U.S. at 26) (internal quotation mark omitted). The court further explained that this Court

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[1] Respondents also alleged violations of California law, which are not at issue in this petition.

"has regularly concluded that statutory claims in a variety of contexts are arbitrable." App. 41a. In the district court's view, however, the CROA grants consumers a "non-waivable right to sue" in court, rendering respondents' arbitration agreements void and unenforceable. App. 41a-45a. Petitioners appealed the district court's refusal to compel arbitration pursuant to the FAA, 9 U.S.C. § 16(a)(1)(B).

b. A divided panel of the court of appeals affirmed. App. 1a-29a. The panel majority recognized the "'liberal federal policy favoring arbitration agreements.'" App. 7a (quoting *Gilmer*, 500 U.S. at 25). The majority further explained that a party must adhere to an agreement to arbitrate claims "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." App. 8a (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (internal quotation marks omitted). Accordingly, the "burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies." App. 8a (citing *Gilmer*, 500 U.S. at 26).

Nevertheless, the majority found that the "plain language of the CROA" compels concluding that Congress precluded arbitration of CROA claims. App. 17a. The majority reasoned that CROA's disclosure provision refers to a "right to sue," and that the "plain meaning of the phrase 'right to sue' . . . involves the right to bring an action in a court of law," not in arbitration. App. 10a. The majority found it insignificant that the "right to sue" mentioned in the disclosure provision is established, not in that provision, but instead in the CROA's civil liability provi-

sion, 15 U.S.C. § 1679g, the language of which concededly does not preclude submission of a CROA claim to arbitration. App. 13a.

The majority also relied on the CROA's anti-waiver provision, 15 U.S.C. § 1679f(a). App. 14a-15a. In the majority's view, the anti-waiver provision "invalidates any waiver of the right to sue" in a court, thus rendering the arbitration clause in the Aspire Visa agreement void and unenforceable. App. 15a. The majority acknowledged that, because the anti-waiver provision bars enforcement of a waiver of CROA rights by a "court *or any other person*," 15 U.S.C. § 1679f(a) (emphasis added), the provision necessarily contemplates the resolution of disputes between a credit repair organization and a consumer by an arbitrator. App. 15a. But the majority nonetheless considered the statute to bar submission of a consumer's CROA claim to an arbitrator. According to the majority, the "'any other person' language of Section 1679(f) assures that [the CROA's] rights and protections would be preserved in an arbitration instituted by a credit repair organization" in, for example, a collection proceeding. *Id.*

The majority expressly "realize[d] that [its] decision is in conflict with that of two of [its] sister circuits," but was "unpersuaded by the reasoning of those cases." App. 17a (citing *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007); and *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009)). In the majority's view, the Third and Eleventh Circuits' decisions gave too "little regard to the 'right to sue' language in the statute," and relied "upon reasoning in Supreme Court cases that are distinguishable from the situation here." App. 17a.

c. Judge Tashima dissented. App. 23a-29a. He explained that, while the CROA's disclosure provision mentions a "right to sue," the provision "does not purport to create any substantive rights, including the right to sue. Rather, its sole purpose is to set forth a disclosure statement to be communicated verbatim to consumers." App. 25a. "The 'right to sue' listed in § 1679c(a)," Judge Tashima observed, "is provided for in 15 U.S.C. § 1679g, which establishes civil liability for violations of the CROA." App. 26a. While the civil liability provision generally confers "the 'right to sue' a credit repair organization which violates the CROA," Judge Tashima explained, the statute nowhere "mandate[s] a judicial forum for enforcement of the CROA's substantive provisions." App. 26a. Moreover, Judge Tashima observed, "the mere mention of a 'right to sue' does not necessarily mean the right to sue *in court*, especially given the lack of other statutory language supporting this interpretation." App. 27a.

Judge Tashima rejected the majority's reliance on the CROA's anti-waiver provision, Section 1679f. The language of that provision, Judge Tashima observed, "indicates that Congress intended that CROA claims . . . be enforceable outside a judicial forum." App. 26a. That is because the provision prohibits any waiver of CROA's protections or rights "by any Federal or State court *or any other person*." App. 26a (quoting 15 U.S.C. § 1679f(a)) (emphasis and omissions in original). "By including 'or any other person' in the same sentence that lists Federal and State courts as appropriate fora for CROA claims," Judge Tashima explained, "Congress clearly

indicated that arbitrators, mediators, and other third parties may decide CROA claims." App. 27a.

Having found that the statutory text fails to support the majority's decision, Judge Tashima also noted the absence of any legislative history "establish[ing] that Congress intended CROA claims to be non-arbitrable." App. 28a. In addition, he found "no inherent conflict between arbitration and CROA's underlying purpose because Plaintiffs may enforce their rights under the substantive provisions of CROA even if compelled to arbitrate." *Id.* Judge Tashima concluded that the court "should not lightly create a circuit split on an issue of national application on the basis of the flimsy evidence on which the majority relies." App. 27a-28a.

d. The court of appeals, over Judge Tashima's dissent, denied panel rehearing and rehearing en banc. App. 46a-47a.

REASONS FOR GRANTING THE PETITION

The courts of appeals are squarely divided over whether Congress intended to preclude arbitration of claims arising under the CROA. The issue is an important and recurring one, and this case presents a highly suitable vehicle for resolving it. The Ninth Circuit, moreover, answered it incorrectly: Nothing in the CROA overcomes the strong presumption that an arbitration agreement is enforceable under the Federal Arbitration Act. The Court should grant certiorari to resolve the court of appeals' disagreement, and should reverse the judgment below.

A. The Courts of Appeals Are Divided on the Question Presented

As the Ninth Circuit expressly recognized below, the courts of appeals are divided on the question presented in this case. The Third and Eleventh Circuits have held that nothing in the CROA precludes enforcement of an agreement to arbitrate claims brought under that statute. The Ninth Circuit expressly rejected the approach of those courts, holding instead that Congress intended to preclude the submission of CROA claims to arbitration.

1. a. In *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), the Third Circuit held that CROA claims are subject to arbitration. The court allowed that the CROA's civil liability provision, Section 1679g, "contemplate[s] consumers' [CROA] actions being brought in a judicial forum . . . and to that extent may be said to recognize a consumer's right to proceed in court." *Id.* at 381. The court explained, however, that the statute contains no indication "that Congress . . . intended to exclude claims asserted under the CROA . . . from arbitration agreements." *Id.* at 382. The court rejected reliance on the "right to sue" language in the CROA's disclosure provision, explaining that the provision "does not specify the forum for the resolution of the dispute and therefore does not support [the] argument that the CROA provides a consumer with the right to bring suit in a judicial, rather than an arbitral, forum." *Id.* at 377 n.4. Moreover, "even if the use of the word 'sue' implies the availability of a judicial forum for an action against a credit repair organization, use of the word would not mean that the organization could not as-

sert . . . the right to invoke a contractual arbitration provision to change the forum." *Id.*

Having determined that the CROA creates no right to a judicial forum, the Third Circuit found that the CROA's anti-waiver provision, 15 U.S.C. § 1679f(a), is inapplicable. "There is nothing for a consumer to waive under our understanding of the provision[] of the statute[] dealing with [a] judicial forum[]." *Gay*, 511 F.3d at 383 n.10. But even assuming *arguendo* that the CROA conferred a right to a judicial forum, the Third Circuit held that the statute's anti-waiver provision would not bar enforcement of an arbitration agreement. Relying on this Court's decisions in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), the court "construe[d] the CROA's anti-waiver provision as only extending to rights premised on the imposition of statutory duties." *Gay*, 511 F.3d at 385.

The Eleventh Circuit subsequently adopted the Third Circuit's position in *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009). The court explained its holding succinctly:

> The text of CROA makes no mention of arbitration. The only right created in the disclosure provision is the right to a statement containing certain disclosures. The "right to sue" referenced in the required disclosure is set forth separately in the civil liability section, 15 U.S.C. § 1679g(a), which does not mention the word "right," the expres-

> sion "right to sue," or place any limitation on arbitration. Although CROA requires credit repair organizations to inform consumers of their right to a private cause of action, such does not preclude arbitration under CROA. "A statute's provision for a private right of action alone is inadequate to show that Congress intended to prohibit arbitration[]" . . . . *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1274 (11th Cir. 2002) (quoting *Gilmer*, 500 U.S. at 29)).

Picard, 564 F.3d at 1255. The court found the CROA's anti-waiver provision irrelevant, because the "CROA simply does not create a right to sue only in a judicial forum." *Id.*

b. The Ninth Circuit below expressly acknowledged—and squarely rejected—the approach of the Third and Eleventh Circuits, instead holding that "the plain language of the CROA prohibits enforcement of [an] arbitration agreement." App. 17a. The Ninth Circuit expressed that its sister circuits had "give[n] surprisingly little regard to the 'right to sue' language in the statute, and rel[ied] upon reasoning in Supreme Court cases that are distinguishable from the situation here." App. 17a. Because the Ninth Circuit denied rehearing en banc, the conflict among the courts of appeals is entrenched.

2. As a result of the Ninth Circuit's holding, the enforceability of an agreement to arbitrate claims under the CROA depends entirely upon the jurisdiction in which the plaintiff elects to file suit. Plaintiffs bringing CROA suits in the Third and Eleventh

Circuits will be subject to compelled arbitration based on a valid agreement to arbitrate. Such agreements will be unenforceable in the Ninth Circuit, however, such that CROA claims in that circuit must be resolved by the courts rather than in arbitration. That differential treatment of prospective plaintiffs and defendants, depending solely on where a suit is filed, should not be allowed to persist.

In addition, CROA claims by nature typically involve consumers with poor credit, and poor credit is disproportionately found in the three circuits to have pronounced on the arbitrability of CROA claims—the Third, Ninth, and Eleventh Circuits. According to statistics compiled by the Administrative Office of the U.S. Courts, for instance, in the three months ending on September 30, 2010, the Third, Ninth, and Eleventh Circuits accounted for over 45% of all new personal bankruptcy filings. *See* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/ 0910_f23.pdf.

The effect of the conflict among the courts of appeals in fact is more pronounced because of the class-action nature of many CROA actions. This case, for instance, involves a purported nationwide class of credit card holders. The decision below gives rise to significant forum-shopping opportunities in such cases. Class action plaintiffs seeking to avoid enforcement of arbitration agreements will aim to file their CROA action within the Ninth Circuit's expansive geographic reach. The Ninth Circuit's prohibition against arbitration of CROA claims thus could

effectively become the nationwide rule unless this Court grants review to resolve the circuit conflict.[2]

B. The Question Presented Is a Recurring Issue of National Importance, and This Case Presents A Highly Suitable Vehicle For Resolving It

1. The question whether CROA claims are subject to arbitration is a recurring issue of national importance. Three courts of appeals have decided the issue in the past three years, and a number of district courts in other circuits have confronted the question whether CROA claims are arbitrable (and have reached divergent conclusions). *See, e.g.*, *Rex v. CSA-Credit Solutions of Am., Inc.*, 507 F. Supp. 2d 788 (W.D. Mich. 2007) (CROA claims subject to arbitration); *Schreiner v. Credit Advisors, Inc.*, No. 07-78, 2007 U.S. Dist. LEXIS 74014 (D. Neb. Oct. 2, 2007) (same); *Vegter v. Forecast Fin. Corp.*, No. 07-279, 2007 U.S. Dist. LEXIS 85653 (W.D. Mich. Nov. 20, 2007) (same); *Alexander* v. *U.S. Credit Management*, 384 F. Supp. 2d 1003 (N.D. Tex. 2005) (CROA claims not subject to arbitration); *see also Ace Am. Ins. Co. v. Ascend One Corp.*, No. CCB-06-CV-3371, 2007 WL 1774495 (D. Md. June 15, 2007) (involving

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[2] This case illustrates the potential for forum shopping engendered by the decision below. The plaintiffs in this suit attempted to add plaintiffs from a similar suit originally brought—and voluntarily dismissed—in federal court in Alabama. *See Greenwood v. CompuCredit Corp.*, No. 4:08-cv-4878, Dkt. No. 90, at 4 (N.D. Cal.). Under the law of the Eleventh Circuit, the claims of those additional, would-be plaintiffs would be subject to arbitration. But if those plaintiffs were added to the instant suit, arbitration of their claims would be prohibited under the decision below.

agreement to arbitrate CROA claims; court did not consider whether CROA claims are arbitrable); *Vertucci v. Orvis*, No. 3:05 CV 1307, 2006 WL 1688078 (D. Conn. May 30, 2006) (same); *Arnold v. Goldstar Financial Systems, Inc.*, No. 01 C 7694, 2002 WL 1941546 (N.D. Ill. Aug. 22, 2002) (same).

Additionally, the question whether claims under the CROA are subject to arbitration is growing in importance. For instance, the number of personal bankruptcy filings has risen dramatically in the past several years. According to figures reported by the Administrative Office of the U.S. Courts, there were a total of 822,590 newly filed personal bankruptcy petitions in the United States in 2007.[3] That number increased by approximately 72%, to 1,412,838, in 2009.[4] And because the demand for credit repair services presumably correlates strongly with a decline in the quality of consumer credit, the number of CROA suits—and, thus, disputes over arbitration of CROA claims—will only increase in the years to come. This Court's resolution of the question presented will be crucial to the establishment of a predictable regime for resolving an ever growing number of disputes under the CROA.

2. This case also presents a highly suitable vehicle for resolving the question presented. The court below held that petitioners could not compel arbitration of respondents' CROA claims, even though there is no dispute that the agreements between respon-

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[3] *See* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2007/dec07/F02dec07.pdf.

[4] *See* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2009/dec09/F02dec09.pdf.

dents and petitioners call for arbitration of actions like this one. If this Court were to reject the Ninth Circuit's approach and instead adopt the position of the Third and Eleventh Circuits, the decision below refusing to compel arbitration would necessarily be reversed. This case therefore squarely presents the question whether CROA claims are subject to arbitration.[5]

C. The Court of Appeals Erred in Holding That CROA Claims Are Not Subject To Arbitration

1. The Ninth Circuit erred in holding that CROA claims are not arbitrable. This Court has long recognized that the Federal Arbitration Act institutes a "federal policy favoring arbitration" and that courts therefore must "rigorously enforce agreements to arbitrate." *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1986) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985)). The strong federal policy favoring arbitration applies with full force "when a party bound by an agreement raises a claim founded on statutory rights." *Id.*

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[5] Petitioners argued in the district court that they do not qualify as "credit repair organizations" and thus do not fall within the coverage of the CROA. Neither the district court nor the court of appeals reached that issue. App. 9a n.3. Under the decision below, the question whether petitioners constitute "credit repair organizations" would be decided by a court rather than in an arbitration proceeding. But if this Court grants certiorari and reverses the decision below, that question would be resolved in an arbitration proceeding.

To be sure, Congress has the power to negate the operation of the FAA with respect to a given statute so as to preclude arbitration of claims arising under the statute. "[S]uch an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (quoting *Mitsubishi Motors*, 473 U.S. at 628) (alterations in original; citation omitted). But it is well-settled that "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* And this analysis must be guided by a "'healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24). The presumption favoring arbitration is so strong that, in the past 25 years, this Court has *not once* denied the arbitrability of a federal statutory cause of action.[6]

2. a. The court of appeals' holding precluding arbitration of CROA claims is incorrect under the governing standards. The CROA establishes a civil

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[6] *See, e.g.*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (Truth in Lending Act claims are subject to arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (Age Discrimination in Employment Act claims subject to arbitration); *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989) (securities fraud actions subject to arbitration); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1986) (Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act claims subject to arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (federal antitrust claims subject to arbitration).

cause of action, which states in relevant part: "Any person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person in" a manner determined under the statute. 15 U.S.C. § 1679g(a). That provision makes no mention of arbitration. And there is no suggestion that Congress intended the provision to create an *exclusively* judicial remedy. Given the strong presumption favoring arbitrability of a statutory cause of action, the only plausible conclusion is that Congress did not intend to preclude arbitration of CROA claims.

What is more, neither respondents nor the court of appeals has pointed to any legislative history discussing arbitration of CROA claims, much less indicating any intention to preclude arbitration. *See McMahon*, 482 U.S. at 227 (intention to preclude arbitration "will be deducible from text or legislative history") (internal quotation marks omitted). Nor is there any "inherent conflict between arbitration and the statute's underlying purposes." *Id.* Rather, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637; App. 28a (Tashima, J., dissenting).

In short, nothing in the CROA's text, history, or purposes overcomes the "'healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24). That should be the end of the matter.

b. The majority below rejected that straightforward analysis. The majority instead relied on the

CROA's disclosure provision, which requires credit repair organizations to state to consumers in writing, *inter alia*: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." 15 U.S.C. § 1679c(a). "The plain meaning of the phrase 'right to sue,'" the majority perceived, "clearly involves the right to bring an action in a court of law." App. 10a.

The majority's analysis is fundamentally flawed. The disclosure provision does not create a "right to sue." Rather, the only right that provision creates is a consumer's right to receive a congressionally prescribed, written statement from a credit repair organization. That statement is meant to inform the consumer of certain "rights," each of which is created in other portions of the statute. The "right to sue" is defined in Section 1679g—the CROA's civil liability provision—which makes no mention whatsoever of arbitration. Nothing in that section thus could overcome the strong presumption that Congress intends statutory claims to be subject to arbitration.

The "right to sue" language in the disclosure provision thus does not *create* any right, but rather *describes* the cause of action available under the CROA. But describing a cause of action as a "right to sue" says nothing about whether the parties can agree to arbitrate their dispute. Indeed, *any* statutory cause of action can properly be described as a "right to sue," and yet this Court has repeatedly held that disputes arising under statutes with express causes of action are subject to arbitration. *See supra* note 6. Indeed, this Court so held even when the cause of action in the relevant statute *explicitly* speaks of courts as the relevant forum.

For example, the Age Discrimination in Employment Act (ADEA) provides: "Any person aggrieved may bring a civil action *in any court of competent jurisdiction* for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 626(c)(1) (emphasis added). This Court nonetheless found ADEA claims to be arbitrable in *Gilmer*. Similarly, the Securities Exchange Act of 1934 vests jurisdiction over "all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder" in the "district courts of the United States." 15 U.S.C. § 78aa. This Court nonetheless held Exchange Act claims arbitrable in *McMahon*.

Thus, as the Eleventh Circuit explained in *Picard*, "CROA simply does not create a right to sue only in a judicial forum." 564 F.3d at 1255.

c. The court of appeals erred in relying on the CROA's anti-waiver provision. That provision treats as void "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under" the CROA. 15 U.S.C. § 1679f(a). Because the CROA does not grant a consumer a right to an exclusively judicial forum, a consumer's agreement to submit a dispute to arbitration does not waive any "right of the consumer" under the CROA.

Even assuming, *arguendo*, that the CROA creates a right to an exclusively judicial forum, the anti-waiver provision in the CROA would not preclude enforcement of a consumer's agreement to arbitrate CROA claims. First, the text of the anti-waiver provision demonstrates that Congress *affirmatively intended* for CROA claims to be arbitrable. The provi-

sion says that, "Any waiver by any consumer of any protection provided by or any right of the consumer under [the CROA] . . . may not be enforced by any Federal or State court *or any other person*." 15 U.S.C. § 1679f(a) (emphasis added). The italicized language confirms Congress's intent that "persons" rather than federal and state courts—*e.g.*, arbitrators—would play a role in enforcing the CROA. A provision that affirmatively contemplates arbitration cannot rationally be read to preclude arbitration.

Second, the anti-waiver provision is entitled "Noncompliance with this subchapter." 15 U.S.C. § 1679f.[7] "'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *B'hood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947)). The anti-waiver provision's title makes clear that it is concerned with waivers of "compliance" with the CROA's substantive provisions. The provision thus would treat as void a waiver of the right to receive the disclosure required by Section 1679c, or the right established by Section 1679e to cancel a contract for credit repair services. But as this Court has repeatedly held, statutes disallowing waivers of "compliance" with the substantive provisions of a statute do not preclude arbitration agreements: arbitration agreements do not waive compliance with the statute's substantive provisions, but provide for their enforcement in an arbitral forum. *See McMahon*, 482

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[7] The title was enacted by Congress, not inserted by a subsequent codifier. *See* Pub. L. No. 104-208, § 408 (1996).

U.S. at 228 (Exchange Act); *Rodriguez de Quijas*, 490 U.S. at 481-83 (Securities Act).

Moreover, the CROA was enacted in 1996, nearly 50 years after the FAA, under which it had been long-settled that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The CROA was also enacted well after this Court had repeatedly interpreted the FAA to establish a strong presumption in favor of arbitration. "Congress was, of course, aware of this presumption once it was established by this Court." *Montana v. United States*, 450 U.S. 544, 552 n.2 (1981). Yet there is nothing in the text of the CROA or its legislative history indicating that Congress even considered precluding arbitration of CROA claims. "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396, n. 23 (1991) (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)).

The question whether the anti-waiver provision should be read to preclude arbitration of CROA claims "must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. Accordingly, even assuming there were "any doubts" about whether the anti-waiver provision precludes arbitration of CROA claims, those doubts "should be resolved in favor of arbitration." There is no basis for concluding that the CROA's anti-waiver

provision bars arbitration, much less for concluding that it does so with sufficient clarity to overcome the requirement to resolve any doubts in favor of arbitration.

The Ninth Circuit thus incorrectly decided the question of whether CROA claims are subject to arbitration, and in doing so created a circuit split on a question of national importance. This Court's review is warranted to resolve the conflict and correct the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 24, 2011

APPENDIX

APPENDIX A
COURT OF APPEALS OPINION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WANDA GREENWOOD; LADELLE HATFIELD; DEBORAH MCCLEESE, on behalf of themselves and other similarly situated, *Plaintiffs-Appellees,* v. COMPUCREDIT CORPORATION and COLUMBUS BANK AND TRUST, jointly and individually, *Defendants-Appellants.*	No. 09-15906 D.C. No. 4:08-cv-04878-CW OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted
April 12, 2010—San Francisco, California

Filed August 17, 2010

Before: Andrew J. Kleinfeld, A. Wallace Tashima, and Sidney R. Thomas, Circuit Judges.

COUNSEL

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Adrian Barnes, Gilbert & Sackman, Los Angeles, California, W. Lloyd Copeland, Taylor-Martino-Zarzaur, PC, Mobile, Alabama, for plaintiffs-appellees.

OPINION

THOMAS, Circuit Judge:

This appeal presents the question, *inter alia*, as to whether the word "sue," as used in the Credit Repair Organization Act ("CROA"), means "arbitrate." Or, perhaps the question is, as Alice put it: "whether you can make words mean so many different things?"[1] We conclude that Congress meant what it said in using the term "sue," and that it did not mean "arbitrate." We affirm the order of

[1]Lewis Carroll, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE, IN THE ANNOTATED ALICE: THE DEFINITIVE EDITION 213 (Martin Gardner ed., Norton Publishers) (2000).

the district court denying the Credit Providers' motion to compel arbitration.

I

CompuCredit marketed a subprime credit card under the brand name Aspire Visa to consumers with low or weak credit scores through massive direct-mail solicitations and the internet.[2] CompuCredit marketed the card and the cards were issued by Columbus Bank and Trust (collectively "Credit Providers").

Greenwood and her fellow plaintiffs ("Consumers") allege CompuCredit marketed the card by representing to consumers it could be used to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." Consumers allege the promotional materials noted there "was no deposit required," and that consumers would immediately receive $300 in available credit when they received the card. In fact, they allege, Credit Providers charged a $29 finance charge, a monthly $6.50 account maintenance fee, and a $150 annual fee, assessed immediately against the $300 limit before the consumer received the card. In aggregate, the card had $257 in fees the first year. Although the promotional material mentioned the fees, it did so in small print amidst other information in the advertisement, and not in proximity to its representations that no deposit was required. Consumers each applied for and received an Aspire card, and were charged these fees. Consumers allege the Credit Providers' actions constitute

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[2]At this stage in the litigation, the facts as recited here are based on the allegations in Plaintiffs' complaint.

several violations of the CROA and of California's Unfair Competition Law.

Before receiving the Aspire Visa credit card, each Consumer received a mailing entitled "Pre-Approved Acceptance Certificate." The Acceptance Certificate includes the following paragraph:

> By signing, I request an Aspire Visa card and ask that an account be opened for me. I certify that everything I have stated in the Acceptance Certificate is true and accurate to the best of my knowledge. I have read and agree to the be bound by the "Summary of Credit Terms" and "Terms of Offer" printed on the enclosed insert, which insert includes a discussion of arbitration applicable to my account, and is incorporated here by reference.

One Consumer mailed in her acceptance, one applied over the internet, and the other applied over the phone.

The "Terms of Offer" states:

> Important — The agreement you receive contains a binding arbitration provision. If a dispute is resolved by binding arbitration, you will not have the right to go to court or have the dispute heard by a jury, to engage in pre-arbitration discovery except as permitted under the code of procedure of the National Arbitration Forum ("NAF"), or to participate as part of a class of claimants relating to such

dispute. Other rights available to you in court may be unavailable in arbitration.

The "Summary of Credit Terms" contains the following:

ARBITRATION PROVISION (AGREEMENT TO ARBITRATE CLAIMS)

Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, will be resolved by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure ("NAF Rules") of the National Arbitration Forum ("NAF") in effect when the Claim is filed. If for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure.

Upon such an election, neither you nor we will have the right to litigate in court the claim being arbitrated, including a jury trial, or to engage in prearbitration discovery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or

> member of any class of claimants relating to any claim subject to arbitration. Except as set forth below, the arbitrator's decision will be final and binding. Other rights available to you in court might not be available in arbitration.

The agreement also provides, "This Agreement, and your Account, and any claim, dispute or controversy (whether in contract, tort or otherwise) . . . are governed by and construed in accordance with applicable federal law and the laws of Georgia."

Consumers brought this action in federal district court, and the Credit Providers moved to compel arbitration of Consumers' CROA claims. The district court held the arbitration clause in the Credit Providers' Aspire Visa credit card agreements was invalid and void under the CROA's prohibition of the waiver of a consumer's right to sue in court, and denied the motion to compel arbitration. The district court also denied the Credit Providers' Motion for Leave to File Motion for Reconsideration. The Credit Providers filed a timely interlocutory appeal challenging the denial of the motion to compel arbitration.

We review the denial of a motion to compel arbitration de novo. *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 652 (9th Cir. 2009); *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 725 (9th Cir. 2007) ("Whether [a federal statute] permits adjudication by binding arbitration is a question of law that we review de novo.").

II

The district court correctly concluded that the arbitration agreement was void because the CROA specifically prohibits provisions disallowing any waiver of a consumer's right to sue in court for CROA violations.

A

We employ our usual methodology in statutory construction. As always, our starting point is the plain language of the statute. *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999). "[W]e examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Id.* If the plain meaning of the statute is unambiguous, that meaning is controlling and we need not examine legislative history as an aid to interpretation unless "the legislative history clearly indicates that Congress meant something other than what it said." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (en banc). If the statutory language is ambiguous, we consult legislative history. *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999).

[1] In this context, we also note that Congress has manifested a "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (internal quotation marks omitted). Specifically, the Federal Arbitration Act declares that "[a] written provision in . . . a contract evincing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of

such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

[2] The Supreme Court has held that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 624, 628 (1985). "[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history." *Id.* More recently, the Supreme Court has reiterated that the Congressional intent to preclude waiver "will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. The burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. *Id.*

B

With these principles in mind, we turn to the Credit Reporting Organization Act. The CROA expressly identifies four rights, which appear in the disclosures section of the statute, 15 U.S.C. § 1679c. The first two rights concern rights that consumers have in relation to credit bureaus, which are not implicated by this suit. The third and fourth rights specifically concern rights that consumers have in

relation to credit repair organizations.[3] The third right directly addresses the Consumers' argument: "You have the right to sue a credit repair organization that violates the Credit Repair Organization Act." 15 U.S.C. § 1679c(a). In addition, each credit repair organization is required to (1) inform the consumer of his or her right to sue, (2) provide such information to the consumer in a separate document containing a verbatim copy of an eight-paragraph text specified by Congress, which enumerates the "right to sue," (3) obtain from the consumer a signature confirming receipt of such information, and (4) keep such signed confirmations on file for two years from the date of signing. 15 U.S.C. § 1679c(a)-(c). The disclosure document must be provided to every consumer "before any contract or agreement between the consumer and the credit repair organization is executed." *Id.* § 1679c(a).

The CROA also contains a non-waiver provision, phrased in unusually comprehensive and precise language: "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter– (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." 15 U.S.C. § 1679f(a).

[3] Thus, the plain language of the CROA provides consumers with the "right to sue." 15 U.S.C. § 1679c. The "right to sue" means what it says. The statute does not provide a right to "some form of dispute resolution," but instead specifies the

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[3]The district court did not rule on whether the Credit Providers are "credit repair organizations" under the meaning of the statute. Therefore, we will not reach this issue on appeal.

"right to sue." The act of suing in a court of law is distinctly different from arbitration. *See Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) ("Arbitration . . . is a private system of justice" distinct from state and federal courts). The right to sue protected by the CROA cannot be satisfied by replacing it with an opportunity to submit a dispute to arbitration.

Where terms are not defined within a statute, they are accorded their plain and ordinary meaning. *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 455 (9th Cir. 1999). The plain and ordinary meaning of terms can be deduced through reference sources, including *Black's Law Dictionary* and general usage dictionaries. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (determining the plain meaning of a contract term by referencing *Black's* and *Webster's* Dictionary).

To sue is "[t]o institute a lawsuit against (another party)." BLACK'S LAW DICTIONARY 1473 (Bryan A. Garner ed., 8th ed., 2004). For "lawsuit," Black's directs us to "suit," *id.* at 905, which is defined as: "[a]ny proceeding by a party or parties against another *in a court of law*." *Id.* at 1475 (emphasis added); *see also Weston v. City Council of Charleston*, 27 U.S. (Pet) 449, 464 (1829) (defining "suit" as "any proceeding *in a court of justice*, by which an individual pursues that remedy in a court of justice, which the law affords him") (emphasis added). The plain meaning of the phrase "right to sue" thus clearly involves the right to bring an action in a court of law.

By contrast, "arbitration" is "[a] method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding." BLACK'S LAW DICTIONARY 112. Arbitration is one of several mechanisms of "alternative dispute resolution," which is "[a] procedure for settling a dispute *by means other than litigation*, such as arbitration or mediation." *Id.* at 86 (emphasis added). The Corpus Juris Secondum underscores that "[a]rbitration is not a judicial proceeding either at common law or under statutes. It is a proceeding separate from litigation based upon its underlying purpose of encouraging dispute resolution *without result to the courts*, and may be characterized as an alternative to litigation." 6 C.J.S. Arbitration § 2 (June 2005) (emphasis added) (citations omitted); *see also Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208 (9th Cir. 1998) ("Arbitration is a creature of contract, a device of the parties rather than the judicial process.") (citation omitted); *Becker v. Davis*, 491 F.3d 1292, 1299 (11th Cir. 2007) ("[A]rbitration is a contractual right that is generally predicated on an express decision to waive the right to a trial in a judicial forum."); *Morrison v. Colo. Permanente Med. Group*, 983 F. Supp. 937, 944 (D. Colo. 1997) ("[C]ases and statutes discuss consistently the terms "arbitration" and "civil action" in a manner that leaves no doubt that arbitration is a creature separate from, and not just a form of, a civil action.").

[4] As a matter of parlance, reference, and common sense, we cannot conclude that when Congress used the word "sue," it really meant

"arbitrate." The district court correctly read the statute, and determined that the consumer's statutory right to sue could not be waived.

III

The Credit Providers raise a number of counter-theories, none of which is persuasive.

A

Credit Providers first argue that, by placing the "right to sue" in the mandatory "Disclosures" section of the statute, thus *requiring* it be explicitly stated to all consumers, does not actually create a right to sue as the terms are ordinarily understood. Under such a reading, Congress, whose purpose in enacting the statute included protecting consumers from misinformation, *see* 15 U.S.C. § 1679(b), drafted a statute which requires credit repair organizations to misinform consumers about a fictional right. Under Defendant's interpretation, Congress was requiring that consumers be told a lie: that they possessed a non-existent right. We should "avoid, if possible, a [statutory] interpretation that would produce 'an absurd and unjust result which Congress could not have intended.' " *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) (quoting *Clinton v. City of New York*, 524 U.S. 417, 429 (1998)). We do not believe Congress was playing Humpty Dumpty with the statute, and we decline to accept the Credit Providers' invitation to go down that particular rabbit hole.

B

The Credit Providers characterize the language stating "you have the right to sue" in Section 1679c as merely a simplified shorthand for the more

"complicated" right to bring a claim under Section 1679g. This is actually a two-step argument. First, Credit Providers argue the "right to sue" language should not be examined independently because it is merely a "simplified" restatement for consumers of the "substantive" rights embodied in the rest of the statute, particularly Section 1679g, which sets out the punishments available for violations of the Act. Second, Credit Providers argue the more general language of Section 1679g does not preclude arbitration.

We disagree. We must, if possible, interpret a statute such that all its language is given effect, and none of it is rendered superfluous. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Under Credit Providers' interpretation, the "right to sue" language, indeed, the entire "Disclosures" section, becomes superfluous and insignificant, merely a restatement of other sections of the statute that expand upon the rights set out in Section 1679c. We decline to adopt such a reading.

In addition, Credit Providers argue the language "right to sue" was used in the Section because it is more "understandable" to the average consumer than a broader phrase such as the "right to bring a claim." This is despite the fact that, according to Credit Providers, Congress meant to give consumers that latter right, rather than the former. If the purpose of the "Disclosures" was to communicate to consumers their right to sue or to proceed using some form of alternative dispute resolution, the phrase "right to sue" is a phrase particularly likely to cause confusion, and lead consumers to misunderstand their rights under the CROA. We

see no reason to interpret the language in a way that goes against the purpose even Credit Providers have ascribed to it. The language actually chosen by Congress should be given effect because it is plain and clear on its face, and we "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

[5] The extremely broad anti-wavier provision in the CROA protects the enumerated "right to sue," by treating as void "[a]ny waiver by any consumer of any protection provided by *or any right of the consumer* under this subchapter . . . ." 15 U.S.C. § 1679f(a) (emphasis added). The Act further provides that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided or any right of the consumer under this subchapter shall be treated as a violation of this subchapter." 15 U.S.C. § 1679f(b). The plain language of the statute demonstrates that the waiver provision applies to the previously enumerated "right to sue." First, the use of the word "any" to describe which rights are covered is "expansive language [that] offers no indication whatever that Congress intended" to limit a statute's reach. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980). Thus, we read the term "any right of the consumer" to apply to all the rights in the statute, including the "right to sue." Second, Congress's consistent use of the word "right" indicates the waiver prohibition applies to the "right to sue," as identical words in a statute should be given a consistent and identical meaning throughout

the statute. *See Powerex Corp v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). Therefore, we conclude that Congress meant what it said. Accordingly, the nonwaiver provision invalidates any waiver of the right to sue.

C

We are also not convinced by Credit Providers' argument regarding the language in 15 U.S.C. § 1679f(a). The section states a consumer waiver of any right or protection "may not be enforced by any Federal or State court or any other person." 15 U.S.C. § 1679f(a). Credit Providers argue the "any other person" language demonstrates Congress intended arbitrators to be able to decide CROA claims. First, we do not think this language leads to such a clear and unilateral conclusion. For example, it is foreseeable that a credit repair organization would institute arbitration proceedings against a consumer for collection of the organization's fees under its contract with the consumer. The CROA creates various non-waivable consumer rights and protections other than the right to sue. In an arbitration collection proceeding, one of the other non-waivable consumer rights or protections could arise. The "any other person" language of Section 1679f(a) assures that these rights and protections would be preserved in an arbitration instituted by a credit repair organization or debt collection agency. It is consistent with a consumer's explicitly stated non-waivable right to sue. Given the plain language creating such a right, we do not find this language requires a different conclusion.

In addition, the statutory language underscores the central role of courts in enforcement of the

statute in § 1679g. This section, which sets out available damages for violations of the CROA, repeatedly refers only to "courts" as the enforcement mechanism. For example, punitive damages may be assessed in "such additional amount as *the court* may allow" and lays out factors that "*the court* shall consider." 15 U.S.C. § 1679g(a)(2)(A), (b) (emphasis added). Thus, the language in the remainder of the statute supports the plain reading of the text creating the right to sue, rather than requiring a different outcome.

[6] We agree with other courts that the "CROA's nonwaiver of rights provisions, combined with its proclamation of a consumer's right to sue, represent precisely the expression of congressional intent required by" the Supreme Court to find that a waiver of judicial remedies is precluded. *Alexander v. U.S. Credit Management, Inc.*, 384 F. Supp. 2d 1003, 1011 (N. D. Tex. 2005). "Congress did not intend to void all waivers of rights under the Act, and require consumers to sign a congressionally mandated enumeration of their rights under the Act, only to permit those very same rights to waived mere moments later upon the signing an agreement such as the one in question here." *Id.* at 1012. We agree with the district court that "[t]o recognize that CROA voids all waivers of 'any *right of the* consumer' and mandates that any waiver of the right to sue is void strikes the court as embracing an *unhealthy* regard for the federal policy favoring arbitration." Dkt. 64, at 8 (citation omitted). Thus, we hold the

plain language of the CROA prohibits enforcement of the arbitration agreement.[4]

IV

We realize this decision is in conflict with that of two of our sister circuits, but we are unpersuaded by the reasoning of those cases. *See Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007); *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009). Both *Gay* and *Picard* give surprisingly little regard to the "right to sue" language in the statute, and rely upon reasoning in Supreme Court cases that are distinguishable from the situation here. As *Picard* essentially follows and adopts the reasoning in *Gay*, we will not deal with the two cases separately.

Gay dispatches with the explicit language creating a consumer's "right to sue" in a mere footnote. The court states that since the section does not specify the forum for resolution of the dispute, it does not support the argument that it provides a "judicial, rather than an arbitral, forum for CROA violations." *Gay*, 511 F.3d at 377 n.4. As discussed in more detail above, this ignores the plain meaning of the word "sue." The Third Circuit continues that even if "sue" implies the availability of a judicial forum (which we believe it does), use of the word "would not mean that the organization could not assert defenses that it had to such an action

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[4]Having found a congressional intent to preclude the waiver of judicial remedies under the CROA in the text of the Act itself, there is no need for us to examine legislative history or any inherent tension between arbitration and the Act's underlying purpose.

> including the right to invoke a contractual arbitration provision to change the forum." *Id.* This ignores completely the anti-waiver clause of the statute. The anti-waiver clause explicitly states that any waiver of any right by the consumer "shall be treated as void" and "may not be enforced by any Federal or State court . . . ." 15 U.S.C. § 1679f(a)(1)-(2). Thus, the organization might assert the defense of the contractual arbitration provision, but the court is explicitly forbidden from enforcing this waiver of the right to sue.

Gay also relies upon analogies to several Supreme Court arbitration cases that we find unavailing. The Third Circuit first analogized the issue to the one the Supreme Court considered in *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), when it determined whether Section 29(a) of the Exchange Act prohibited arbitration agreements. Section 27 of the Act provides, "The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa. Section 29(a) of the Act declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]." *Id.* § 78cc(a). The plaintiffs in *McMahon* argued that Section 29(a) prohibited waiver of the Section 27 right to bring suit in a federal district court.

As pointed out by the court in *McMahon*, the Exchange Act's anti-waiver provision, § 29(a),

> forbids [ ] enforcement of agreements to waive "compliance" with the provisions of the statute. But § 27 itself does not impose any duty with which persons trading in securities must "comply." By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because § 27 does not impose any statutory duties, its waiver does not constitute a waiver of "compliance with any provision" of the Exchange Act under § 29(a).

McMahon, 482 U.S. at 228. In summary, because the Exchange Act only prohibits waivers of compliance with its substantive obligations and the mandate of a judicial forum is not a substantive obligation, the Exchange Act does not preclude arbitration agreements.

Applying *McMahon*, the Third Circuit observed that "the section [of the CROA] in which this anti-waiver provision appears is entitled 'Noncompliance with this subchapter.' " *Gay*, 511 F.3d at 385. The Third Circuit reasoned that the CROA's anti-waiver provision only "extend[s] to rights premised on the imposition of statutory duties." *Id.* Because the right to sue in a judicial forum is not a statutory duty under the CROA, the court concluded that the anti-waiver provision did not apply to it. *Id.* However, the plain text of 15 U.S.C. § 1679f encompasses waivers of "any protection" or "any right" under the CROA–categories which are much broader than mere noncompliance. "[H]eadings and titles are not meant to take the place of the detailed provisions of the text," and where the plain text of

the statute is unambiguous, "the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R., Co.*, 331 U.S. 519, 528-29 (1947); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, it is of use only when it sheds light on some ambiguous word or phrase."). Here, because the text of § 1679f(a) is not ambiguous, we need not turn to the title of the section to clarify its meaning. Further, the substantive-procedural distinction has no application to the CROA. Unlike the Exchange Act, the CROA grants consumers the "right to sue." Vesting jurisdiction to hear a claim in a particular court is quantitatively different from a statute that expressly provides for a right to sue. Thus, § 1679f's prohibition on waivers may not be limited to "compliance" with the CROA, and *McMahon* does not apply.[5]

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[5]The Third Circuit also relies upon the Supreme Court's reasoning in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481-83 (1989), which held that the Securities Act of 1933 does not preclude arbitration. *Gay*, 511 U.S. at 385. *Rodriguez de Quijas* considered jurisdictional and non-waiver language virtually identical to the language considered in *McMahon*. The main difference between the two is that the Securities Act allows for concurrent jurisdiction in state and federal courts whereas the Exchange Act provides for exclusive federal jurisdiction. *Rodriguez de Quijas*, 490 U.S. at 481-83. The court relied on the same distinction between procedural and substantive provisions and held that waiving the jurisdictional provision does not fall under the prohibition against waiving "compliance" with the Act. *Id.* We find this reasoning unpersuasive here for the same reasons discussed in regards to *McMahon*.

We are also not persuaded that the other Supreme Court cases regarding the availability of arbitration require allowing arbitration in this case. For instance, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Supreme Court considered whether the language in 15 U.S.C. § 15(a) rendered antitrust claims non-arbitrable in the context of an international commercial dispute. In relevant part, § 15(a) provides that "any person who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue therefor in any district court of the United States." The Court held that this section did not evidence a congressional intent to preclude Sherman Act claims from being arbitrable, emphasizing that the Federal Arbitration Act and the Convention on the Recognition of Enforcement of Foreign Arbitral Awards favor arbitration for disputes in international commerce. The Court concluded that it was important "to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." *Mitsubishi*, 473 U.S. at 639. The present case differs in that it does not contain an international component. More importantly, the CROA contains express language which precludes waiving "any right of the consumer." 15 U.S.C. § 1679f(a). A plain reading of the statute dictates that one of those rights is the "right to sue a credit repair organization that violates" the CROA. *Id.* § 1679c. The Sherman Act does not contain similar non-waiver language, and thus does not apply to this situation.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991), the Supreme Court considered

whether an arbitration agreement in a securities registration application could be avoided on the theory that arbitration "deprives claimants of the judicial forum provided for by the [Age Discrimination in Employment Act (ADEA)]." The ADEA contains the following non-waiver provision: "any individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." However, the ADEA does not explicitly provide for a "right to sue." Rather, the ADEA takes a "flexible approach to resolution of claims. The EEOC for example, is directed to pursue 'informal methods of conciliation, conference, and persuasion,' 29 U.S.C. § 626(b), which suggests that an out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress." *Gilmer*, 500 U.S. at 29.

Contrary to the ADEA, the CROA specifically grants access to a judicial forum and a right to sue, and reveals no such "flexibility" toward alternative methods of dispute resolution. Moreover, in contrast to language in the ADEA that permits "knowing and voluntary" waiver of statutory rights, the CROA proscribes any "waiver by any consumer of any protection provided by or any right of the consumer under this title" irrespective of a consumer's knowledge or intent. 15 U.S.C. § 1679f(a). Thus, *Gilmer* is also inapplicable here.

Finally, in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 80 (2000), the Supreme Court considered whether claims under the Truth in Lending Act (TILA) were arbitrable. The party challenging arbitration did not "contend that the TILA evinces an intention to preclude a waiver of

judicial remedies." *Id.* Instead, plaintiffs challenged arbitration because the costs and fees would be prohibitive. *Id.* The Court, finding no showing regarding prohibitive costs was made, rejected the argument. Here, arbitration is challenged on the ground that the CROA evinces an intention to preclude a waiver of judicial remedies. *Green Tree* simply does not apply.

V

[7] The CROA gives consumers the "right to sue," and prevents any waiver of "any right" under the statute. We find this sufficient to demonstrate Congress intended that consumers cannot waive their right to sue under the CROA, and instead submit to arbitration. Therefore, we affirm the district court's holding that the forced arbitration clause is void and the court's denial of the motion to compel arbitration of the CROA claims.

AFFIRMED.

TASHIMA, Circuit Judge, dissenting:

Because I disagree with the majority's conclusion that Congress intended to preclude a waiver of a judicial forum for claims under the Credit Repair Organizations Act ("CROA"), I respectfully dissent.

As the majority acknowledges, Congress has manifested "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Under the Federal Arbitration Act, courts should enforce arbitration agreements involving statutory claims " 'unless Congress itself has evinced

an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)). Congress' intent to preclude a waiver of judicial remedies must be shown by the statute's text, its legislative history, or an inherent conflict between arbitration and the statute's underlying purpose. *Id.* Plaintiffs bear the burden of showing that Congress intended to preclude a waiver of a judicial forum for CROA claims. *See Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987) ("The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.").

The majority concludes that the plain language of 15 U.S.C. § 1679c(a) provides consumers with the "right to sue," that the right to sue implies a judicial forum, and that 15 U.S.C. § 1679f prohibits any waiver of this right. (Maj. Op. at 12080.) I submit, however, that the plain language of § 1679c(a) does not confer this right upon consumers, and neither the CROA nor its legislative history shows that Congress intended to preclude a waiver of judicial remedies.

All that § 1679c(a) requires is that a credit repair organization provide consumers with the following written disclosure:

> You have a right to dispute inaccurate information in your credit report . . . .
>
> You have a right to obtain a copy of your credit report . . . .

> You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.
>
> You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it.
>
> . . . .

15 U.S.C. § 1679c(a). This section does not purport to create any substantive rights, including the right to sue. Rather, its sole purpose is to set forth a disclosure statement to be communicated verbatim to consumers.

Each of the rights referred to in § 1679c(a) is separately conferred within Chapter 41 of Title 15, thus indicating that Congress included § 1679c(a) to advise consumers of relevant rights provided for *elsewhere* in the CROA. *See Rex v. CSACredit Solutions of America, Inc.*, 507 F. Supp. 2d 788, 798-99 (W.D. Mich. 2007) ("The inclusion of separate sections actually providing the substantive rights indicates that the language in the disclosures in § 1679c does not create any rights. Rather, the language in § 1679c only sets forth the phrasing that is to be used in advising consumers of their rights under other sections of Chapter 41 of Title 15."). For example, 15 U.S.C. § 1681i provides a consumer with the right to dispute inaccurate information in his credit report, 15 U.S.C. § 1681j provides a consumer with the right to obtain a copy of his credit report,

and 15 U.S.C. § 1679e(a) provides a consumer with the right to cancel a contract with a credit repair organization within three business days. *See Rex*, 507 F. Supp. at 799 n.5.

The "right to sue" listed in § 1679c(a) is provided for in 15 U.S.C. § 1679g, which establishes civil liability for violations of the CROA. Because § 1679g provides for civil liability, a consumer ordinarily has the "right to sue" a credit repair organization which violates the CROA. Nowhere in the CROA, however, does Congress mandate a judicial forum for enforcement of the CROA's substantive provisions. The disclosure language in § 1679c(a), while recognizing a right to sue, does not itself confer that right. *See Gay v. CreditInform*, 511 F.3d 369, 381-82 (3d Cir. 2007) ("Although the statutes clearly contemplate consumers' actions being brought in a judicial forum . . . and to that extent may be said to recognize a consumer's right to proceed in court, they neither contain provisions creating such rights nor indicate that Congress . . . intended to exclude claims asserted under the CROA . . . from arbitration agreements."). Because § 1679c(a) does not establish any rights, but only requires credit repair organizations to make a written disclosure to consumers, the disclosure statement's mention of a "right to sue" cannot be the basis of a non-waivable right under 15 U.S.C. § 1679f.

In addition, 15 U.S.C. § 1679f indicates that Congress intended that CROA claims to be enforceable outside a judicial forum. It provides that "[a]ny waiver . . . of any protection . . . or any right . . . under this subchapter . . . may not be enforced by any Federal or State court *or any other person*."

15 U.S.C. § 1679f(a) (emphasis added). By including "or any other person" in the same sentence that lists Federal and State courts as appropriate fora for CROA claims, Congress clearly indicated that arbitrators, mediators, and other third parties may decide CROA claims. This language indicates that Congress contemplated a role for arbitrators in enforcing CROA claims. On the other hand, the majority's suggestion that the references to "the court" in § 1679g support a right to sue in court, does not overcome the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Such language merely indicates Congress' expectation that the question of civil liability will normally be resolved in a judicial forum. It does not confer a non-waivable right to a judicial forum.

Finally, the mere mention of a "right to sue" does not necessarily mean the right to sue *in court*, especially given the lack of other statutory language supporting this interpretation. The only other circuits to have ruled on this issue are in agreement. *See Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1255 (11th Cir. 2009) ("Although CROA requires credit repair organizations to inform consumers of their right to a private cause of action, such does not preclude arbitration under CROA"); *Gay*, 511 F.3d at 377 n.4 ("[15 U.S.C. § 1679c(a)] does not specify the forum for the resolution of the dispute and therefore does not support [the] argument that the CROA provides a consumer with the right to bring suit in a judicial, rather than an arbitral, forum for CROA violations."). We should not lightly create a circuit split on an issue of national application on the basis

of the flimsy evidence on which the majority relies. *See Maniar v. Fed. Deposit Ins. Corp.*, 979 F.2d 782, 785 (9th Cir. 1992) ("[U]niformity among the circuits in matters having general application to the various states is preferable as long as individual justice is not sacrificed."). We should be "hesitant to create such a split, and we should do so only after the most painstaking inquiry" and only if required by the "unambiguously expressed intent of Congress." *Zimmerman v. Dep't of Justice*, 170 F.3d 1169, 1183-84 (9th Cir. 1999).

The majority does not even address whether the legislative history of the CROA or any inherent conflict between arbitration and the statute's underlying purpose may form a basis for prohibiting waiver of the judicial forum. Nothing cited by Plaintiffs suggests that Congress actually considered the issue of arbitrability of CROA claims, and the legislative history does not establish that Congress intended CROA claims to be non-arbitrable. *See Rex*, 507 F. Supp. 2d at 800 ("In the absence of any discussion of arbitration in the legislative history, the legislative history cannot provide a basis for the Court to conclude that Congress intended claims under the CROA to be nonarbitrable."). In addition, there is no inherent conflict between arbitration and CROA's underlying purpose because Plaintiffs may enforce their rights under the substantive provisions of CROA even if compelled to arbitrate. *See Mitsubishi Motors Corp.*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

Because neither the plain text of the statute, its legislative history, nor any inherent conflict between the purpose of CROA and arbitration shows that Congress intended to preclude a waiver of judicial remedies, I would reverse the district court's order and remand with instructions to compel arbitration.

APPENDIX B
DISTRICT COURT OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WANDA GREENWOOD, LADELLE HATFIELD, and DEBORAH MCCLEESE, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

COMPUCREDIT CORPORATION; COLUMBUS BANK AND TRUST, jointly and individually,

Defendants.

No. C 08-04878 CW

ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION

Defendants Compucredit Corporation and Columbus Bank and Trust move to compel Plaintiffs Wanda Greenwood, Ladelle Hatfield and Deborah McCleese to arbitrate their claims brought pursuant to the Credit Repair Organization Act (CROA).

Plaintiffs oppose the motion. The motion was heard on February 26, 2009. Having considered all of the parties' papers and oral argument on the motion, the Court denies Defendants' motion. The Court concludes that CROA prohibits consumers from waiving their right to sue.

BACKGROUND

The following facts are alleged in the complaint. Defendant Compucredit marketed a subprime credit card under the brand name Aspire Visa to consumers with low or weak credit scores through massive direct-mail solicitations and the internet. Compucredit is the exclusive marketer and advertiser of Aspire Visa credit cards and the credit cards are issued by Columbus Bank and Trust. Compucredit marketed the card by representing to consumers that an Aspire Visa credit card could be used by the consumer to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." The promotional materials also noted that there was "no deposit required," and that consumers would immediately receive $300 in available credit when they received their credit card. However, once Columbus Bank and Trust issued the credit card, consumers were charged a $29 finance charge, a monthly $6.50 account maintenance fee and a $150 annual fee. These fees were immediately assessed against the $300 credit limit before the consumer received the credit card. Although Compucredit's promotional materials mentioned these fees, it did so in small print, buried in other information in the advertisement, and not in proximity to its representations that no deposit was required. Plaintiffs allege that Defendants' actions constitute

several violations of the CROA and of California's Unfair Competition Law.

Before receiving an Aspire Visa credit card, each Plaintiff received a mailing entitled, Pre-Approved Acceptance Certificate. The Acceptance Certificate includes the following paragraph:

> By signing, I request an Aspire Visa card and ask that an account be opened for me. I certify that everything I have stated in the Acceptance Certificate is true and accurate to the best of my knowledge. I have read and agree to be bound by the "Summary of Credit Terms" and "Terms of Offer" printed on the enclosed insert, *which insert includes a discussion of arbitration applicable to my account*, and is incorporated here by reference.

(emphasis in original). Plaintiffs signed the Acceptance Certificate. The "Terms of the Offer" states, in very small bold print in all capitals,

> IMPORTANT -- THE AGREEMENT YOU RECEIVE CONTAINS A BINDING ARBITRATION PROVISION. IF A DISPUTE IS RESOLVED BY BINDING ARBITRATION, YOU WILL NOT HAVE THE RIGHT TO GO TO COURT OR HAVE THE DISPUTE HEARD BY A JURY, TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PERMITTED UNDER THE CODE OF PROCEDURE OF THE NATIONAL

> ARBITRATION FORUM ("NAF"), OR TO PARTICIPATE AS PART OF A CLASS OF CLAIMANTS RELATING TO SUCH DISPUTE. OTHER RIGHTS AVAILABLE TO YOU IN COURT MAY BE UNAVAILABLE IN ARBITRATION.

In even smaller print, the "Summary of Credit Terms" contains the following:

> ARBITRATION PROVISION (AGREEMENT TO ARBITRATE CLAIMS)
>
> Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, will be resolved by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure ("NAF Rules") of the National Arbitration Forum ("NAF") in effect when the Claim is filed. If for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure.
>
> Upon such an election, neither you nor we will have the right to litigate in court the claim being arbitrated,

> including a jury trial, or to engage in pre-arbitration discovery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or member of any class of claimants relating to any claim subject to arbitration. Except as set forth below, the arbitrator's decision will be final and binding. Other rights available to you in court might not be available in arbitration.

The agreement also provides, "This Agreement, and your Account, and any claim, dispute or controversy (whether in contract, tort or otherwise) . . . are governed by and construed in accordance with applicable federal law and the laws of Georgia.[1]

LEGAL STANDARD

I. Motion to Compel Arbitration

Under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, written agreements that controversies between the parties shall be settled by arbitration are valid, irrevocable, and enforceable. 9 U.S.C. § 2. A party aggrieved by the refusal of another to arbitrate under a written arbitration

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[1] The Court takes judicial notice of Compucredit's most recent annual registration with the Georgia Secretary of State and its most recent notice of annual meeting of shareholders, although not of the truth of the facts stated therein. *See Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (court may take judicial notice of facts not reasonably subject to dispute, either because they are generally known, are matters of public record or are capable of accurate and ready determination).

agreement may petition the district court which would, save for the arbitration agreement, have jurisdiction over that action, for an order directing that arbitration proceed as provided for in the agreement. 9 U.S.C. § 4. The FAA further provides that:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . .

9 U.S.C. § 3.

If the court is satisfied "that the making of the arbitration agreement or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* The FAA reflects a "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). A district court must compel arbitration under the FAA if it determines that: 1) there exists a valid agreement to arbitrate; and 2) the dispute falls

within its terms. *Stern v. Cingular Wireless Corp.*, 453 F. Supp. 2d 1138, 1143 (C.D. Cal. 2006) (citing *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).

DISCUSSION

I. Motion to Compel Arbitration

Plaintiffs argue that the Court should not compel arbitration because the arbitration agreement is void under the CROA as to the national class, and it is void and unconscionable under California law as to the California class. Defendants clarify in their reply brief that they move to compel arbitration of the CROA claims as to the national class only, not of the claims pursued by the California class under California law. Therefore, the Court need not address whether the arbitration provision is void and unconscionable under California law.

Plaintiffs argue that the arbitration agreement is void as to the national class because the CROA contains specific provisions disallowing any waiver of a consumer's right to sue in court for CROA violations.[2] Each credit repair organization is

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[2] Defendants do not dispute that they are a "credit repair organization" as defined by 15 U.S.C. § 1679a(3)(A). That section provides,

> The term "credit repair organization" (A) means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of (i) improving any consumer's credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i).

required to (1) inform the consumer of his or her right to sue, (2) provide such information to the consumer in a separate document containing a verbatim copy of an eight-paragraph text specified by Congress, which enumerates the "right to sue," (3) obtain from the consumer a signature confirming receipt of such information and (4) keep such signed confirmations on file for two years from the date of signing. 15 U.S.C. § 1679c(a)-(c). The written disclosure specifically states that consumers "have a *right to sue* a credit repair organization that violates the Credit Repair Organization Act." 15 U.S.C. § 1679c (emphasis added). This disclosure document must be provided to every consumer "before any contract or agreement between the consumer and the credit repair organization is executed." *Id.* § 1679c(a). The CROA contains a non-waiver provision, which states:

> Any waiver by any consumer of any protection provided by or *any right of the consumer* under this subchapter -- (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.

15 U.S.C. § 1679f(a) (emphasis added). Based on these sections, Plaintiffs argue that they have a right to sue under CROA that cannot be waived. The issue of arbitration under CROA appears to be one of first impression in the Ninth Circuit.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 624, 628 (1985), the Supreme Court held, "Having made the bargain to arbitrate, the party should be held to it unless

Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." The Court continued, "If Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history." *Id.* The party seeking to avoid arbitration of a statutory claim has the burden of establishing Congressional intent to preclude arbitration of the claim. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

Only a few courts around the country have confronted this issue. A district court in Texas concluded that "CROA's non-waiver of rights provisions, combined with its proclamation of a consumer's right to sue, represent precisely the expression of congressional intent required by" the Supreme Court to find that a waiver of judicial remedies is precluded. *Alexander v. U.S. Credit Management, Inc.*, 384 F. Supp. 2d 1003, 1011 (N.D. Tx. 2005). That court also stated that "Congress did not intend to void all waivers of rights under the Act, and require consumers to sign a congressionally mandated enumeration of their rights under the Act, only to permit those very same rights to be waived mere moments later upon the signing an agreement such as the one in question here." *Id.* at 1012. A district court in Alabama recently noted, "The striking congruence of the language used in the disclosure provision, § 1679c, and the non-waiver provision, § 1679f, convinces the court that Congress intended to create a right to go to court under CROA that cannot be waived." *Reynolds v. Credit*

Solutions, Inc., 541 F. Supp. 2d 1248, 1258 (N.D. Ala. 2008). That court continued, "To recognize that CROA voids all waivers of 'any *right* of the consumer' and mandates that any waiver of the right to sue is void strikes the court as embracing an *unhealthy* regard for the federal policy favoring arbitration." *Id.* (emphasis in original).

However, a district court in Michigan noted that "besides entitling consumers to the actual disclosure statement, § 1679c does not afford consumers any rights or protections." *Rex v. CSA-Credit Solutions of America, Inc.*, 507 F. Supp. 2d 788, 798 (W.D. Mich. 2007). The court concluded that a different section of the statute, § 1679g(a), provides consumers with the actual right to bring a claim, and that section "does not contain any language indicating that claims under the CROA are nonarbitrable." *Id.* at 799.

The Third Circuit addressed this issue and similarly held that CROA's "anti-waiver provision as a matter of legislative intent would not apply to a right to assert claims in a judicial forum or on a class action basis, and a consumer asserting claims pursuant to the CROA may therefore waive such rights." *Gay v. Creditinform*, 511 F.3d 369, 383 (3d Cir. 2007).

The Third Circuit analogized the issue to one that the Supreme Court considered in *Shearson/Am. Express, Inc. v. McMahon* when it determined whether section 29(a) of the Exchange Act prohibited arbitration agreements. Section 27 of the Act provides, "The district courts of the United States . . . shall have exclusive jurisdiction of violations of

this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa. And section 29(a) of the Act declares void "any condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]." *Id.* § 78cc(a). The plaintiffs in *McMahon* argued that section 29(a) prohibited waiver of the section 27 right to bring suit in a federal district court.

The Third Circuit took particular note of the following analysis in *McMahon*: "What the anti-waiver provision of § 29 forbids is enforcement of agreements to waive 'compliance' with the provisions of the statute," and "§ 27 itself does not impose any duty with which persons trading in securities must 'comply.'" *McMahon*, 482 U.S. at 228. The Supreme Court distinguished between the procedural right that section 27 provides, the right to file an action in a federal district court, and the substantive rights that section 29(a) provides. The Court continued, "By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act," and "[b]ecause § 27 does not impose any statutory duties, its waiver does not constitute a waiver of 'compliance with any provision' of the Exchange Act under § 29(a)." *Id.*

Applying *McMahon*, the Third Circuit observed that "the section [of the CROA] in which this anti-waiver provision appears is entitled 'Noncompliance with this subchapter.'" *Gay*, 511 F.3d at 385. The Third Circuit reasoned that CROA's anti-waiver provision only "extend[s] to rights premised on the

imposition of statutory duties." *Id.* Because the right to sue in a judicial forum is not a statutory duty under the CROA, the court concluded that the antiwaiver provision did not apply to it. *Id.*

The Court finds the reasoning of *Alexander* and *Reynolds* more persuasive than that in *Rex* and *Gay*. In making this decision, the Court is mindful that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26. The Court also notes that the Supreme Court has regularly concluded that statutory claims in a variety of contexts are arbitrable. *See, e.g., Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 88-92 (2000) (Truth in Lending Act); *Gilmer*, 500 U.S. at 35 (Age Discrimination in Employment Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479-86 (1989) (Securities Act of 1933); *McMahon*, 482 U.S. at 227-40 (Securities Exchange Act of 1934, Racketeer Influenced and Corrupt Organization Act); *Mitsubishi Motors*, 473 U.S. at 628-40 (Sherman Anti-Trust Act).

However, the "right to sue" and non-waiver language used in CROA is different in important respects from other statutory language that the Supreme Court found not to preclude a waiver of judicial remedies. For instance, in *Mitsubishi Motors*, the Court considered whether language in 15 U.S.C. § 15(a) rendered antitrust claims non-arbitrable. In relevant part, § 15(a) provides that "any person who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue therefor in any district court of the United States." The Court held that this section did

not evidence a congressional intent to preclude Sherman Act claims from being arbitrable. Further, the Court noted that the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards favor arbitration for disputes in international commerce. The Court concluded that it was important "to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." *Mitsubishi*, 473 U.S. at 639. The present case differs from *Mitsubishi* in that it does not contain an international component. Further, CROA contains express language which precludes waiving "any right of the consumer." 15 U.S.C. § 1679f(a). A plain reading of the statute dictates that one of those rights is the "right to sue a credit repair organization that violates" CROA. *Id.* § 1679c. The Sherman Act does not contain similar non-waiver language.

In *Rodriguez de Quijas*, the Court held that the Securities Act of 1933 does not preclude arbitration. 490 U.S. 481-83. There, the Court considered jurisdictional and non-waiver language virtually identical to the language considered in *McMahon*. The main difference between the two is that the Securities Act allows for concurrent jurisdiction in state and federal courts whereas the Exchange Act provides for exclusive federal jurisdiction. *Id.* The Court relied on the same distinction between procedural and substantive provisions and held that waiving the jurisdictional provision does not fall under the prohibition against waiving "compliance" with the Act. *Id.*

Again, the non-waiver provision in CROA differs from the nonwaiver provisions at issue in *McMahon*

and *Rodriguez*. CROA's nonwaiver provision is not limited to the waiver of compliance with the Act. Though the section of the CROA in which the non-waiver provision appears is entitled "Noncompliance with this subchapter," the following text of the statute specifically voids the waiver of any rights of the consumer. 15 U.S.C. § 1679f(a). The Supreme Court has noted that "the title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, it is of use only when it sheds light of some ambiguous word or phrase." *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). Here, because the text of § 1679f(a) is not ambiguous, the Court need not turn to the title of section to clarify its meaning. Further, the substantive–procedural distinction has no application to CROA. Unlike the Exchange Act and the Securities Act, CROA grants consumers the "right to sue." Vesting jurisdiction to hear a claim in a particular court is qualitatively different from a statute that expressly provides for a right to sue.

In *Gilmer*, the Court considered whether an arbitration agreement in a securities registration application could be avoided on the theory that arbitration "deprives claimants of the judicial forum provided for by the [Age Discrimination in Employment Act (ADEA)]." 500 U.S. at 29. The ADEA contains the following nonwaiver provision: "any individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." However, the ADEA does not explicitly provide for a "right to sue." Rather, the ADEA takes a "flexible approach to resolution of claims. The EEOC, for example, is directed to pursue 'informal

methods of conciliation, conference, and persuasion,' 29 U.S.C. § 626(b), which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress." *Gilmer*, 500 U.S. at 29.

Contrary to the ADEA, CROA specifically grants access to a judicial forum as a right and reveals no such "flexibility" toward alternative methods of dispute resolution. Moreover, in contrast to language in the ADEA that permits "knowing and voluntary" waiver of statutory rights, CROA proscribes any "waiver by any consumer of any protection provided by or any right of the consumer under this title" irrespective of a consumer's knowledge or intent. 15 U.S.C. § 1679f(a).

In *Green Tree*, the Supreme Court considered whether claims under the Truth in Lending Act (TILA) were arbitrable. The party challenging arbitration did not "contend that the TILA evinces an intention to preclude a waiver of judicial remedies." 531 U.S. at 90. Instead, arbitration was challenged because the costs and fees would be prohibitive. *Id.* The Court held that the party seeking to avoid arbitration on such grounds "bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. The Court concluded that "neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point." *Id.* Therefore, the Court rejected the argument that prohibitive costs made it impossible to vindicate statutory rights in arbitration. *Id.* Unlike *Green Tree*, in the present case, arbitration is directly challenged on the ground

that CROA evinces an intention to preclude a waiver of judicial remedies.

In sum, the Court concludes that Congress intended claims under the CROA to be non-arbitrable. Requiring a dispute to be resolved through arbitration is incompatible with CROA's non-waivable right to sue. Therefore, the Court finds that the arbitration clause is void.[3]

CONCLUSION

For the foregoing reasons, the Court denies Defendants' motion to compel arbitration of Plaintiffs' CROA claims as they pertain to the national class (Docket Nos. 17 and 27).

IT IS SO ORDERED.

Dated: 4/1/09

/s/Claudia Wilken
CLAUDIA WILKEN
United States District Judge

[3] To the extent the Court relied upon evidence to which Defendants objected, the objections are overruled. To the extent the Court did not rely on such evidence, Defendants' objections are overruled as moot.

APPENDIX C
DENIAL OF REHEARING

FILED

OCT 27 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WANDA GREENWOOD; et al., Plaintiffs - Appellees v. COMPUCREDIT CORPORATION and COLUMBUS BANK AND TRUST, jointly and individually, Defendants - Appellants.	No. 09-15906 D.C. No. 4:08-cv-04878-CW Northern District of California, Oakland ORDER

Before: KLEINFELD, TASHIMA and THOMAS, Circuit Judges.

Judges Kleinfeld and Thomas have voted to deny the appellants' petition for rehearing. Judge

Tashima has voted to grant the appellants' petition for rehearing. Judge Thomas has voted to deny the appellants' petition for rehearing en banc and Judge Kleinfeld has so recommended. Judge Tashima has recommended that the appellants' petition for rehearing en banc be granted.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are rejected.

APPENDIX D
RELEVANT STATUTES

FEDERAL ARBITRATION ACT

9 U.S.C. § 2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

CREDIT REPAIR ORGANIZATIONS ACT

15 U.S.C. § 1679

Findings and purposes

(a) Findings

The Congress makes the following findings:

(1) Consumers have a vital interest in establishing and maintaining their credit worthiness and credit standing in order to obtain and use credit. As a result, consumers who have experienced credit problems may seek assistance from credit repair

organizations which offer to improve the credit standing of such consumers.

(2) Certain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters.

(b) Purposes

The purposes of this subchapter are—

(1) to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services; and

(2) to protect the public from unfair or deceptive advertising and business practices by credit repair organizations.

15 U.S.C. § 1679a

Definitions

For purposes of this subchapter, the following definitions apply:

(1) Consumer

The term "consumer" means an individual.

(2) Consumer credit transaction

The term "consumer credit transaction" means any transaction in which credit is offered or extended to an individual for personal, family, or household purposes.

(3) Credit repair organization

The term "credit repair organization"—

(A) means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of—

(i) improving any consumer's credit record, credit history, or credit rating; or

(ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i); and

(B) does not include—

(i) any nonprofit organization which is exempt from taxation under section 501(c)(3) of Title 26;

(ii) any creditor (as defined in section 1602 of this title), with respect to any consumer, to the extent the creditor is assisting the consumer to restructure any debt owed by the consumer to the creditor; or

(iii) any depository institution (as that term is defined in section 1813 of Title 12) or any Federal or State credit union (as those terms are defined in section 1752 of Title 12), or any affiliate or subsidiary of such a depository institution or credit union.

(4) Credit

The term "credit" has the meaning given to such term in section 1602(e) of this title.

15 U.S.C. § 1679b

Prohibited practices

(a) In general

No person may—

(1) make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading (or which, upon the exercise of reasonable care, should be known by the credit repair organization, officer, employee, agent, or other person to be untrue or misleading) with respect to any consumer's credit worthiness, credit standing, or credit capacity to—

(A) any consumer reporting agency (as defined in section 1681a(f) of this title); or

(B) any person—

(i) who has extended credit to the consumer; or

(ii) to whom the consumer has applied or is applying for an extension of credit;

(2) make any statement, or counsel or advise any consumer to make any statement, the intended effect of which is to alter the consumer's identification to prevent the display of the consumer's credit record, history, or rating for the purpose of concealing adverse information that is accurate and not obsolete to—

(A) any consumer reporting agency;

(B) any person—

(i) who has extended credit to the consumer; or

(ii) to whom the consumer has applied or is applying for an extension of credit;

(3) make or use any untrue or misleading representation of the services of the credit repair organization; or

(4) engage, directly or indirectly, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of the credit repair organization.

(b) Payment in advance

No credit repair organization may charge or receive any money or other valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before such service is fully performed.

15 U.S.C. § 1679c

Disclosures

(a) Disclosure required

Any credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed:

"Consumer Credit File Rights Under State and Federal Law

"You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly. However, neither you nor any 'credit repair' company or credit repair organization has the right to have accurate, current, and verifiable information removed from your credit report. The credit bureau must remove accurate, negative information from your report only if it is over 7 years old. Bankruptcy information can be reported for 10 years.

"You have a right to obtain a copy of your credit report from a credit bureau. You may be charged a reasonable fee. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The credit bureau must provide someone to help you interpret the information in your credit file. You are entitled to receive a free copy of your credit report if you are unemployed and intend to apply for employment in the next 60 days, if you are a recipient of public welfare assistance, or if you have reason to believe that there is inaccurate information in your credit report due to fraud.

"You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.

"You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it.

"Credit bureaus are required to follow reasonable procedures to ensure that the information they report is accurate. However, mistakes may occur.

"You may, on your own, notify a credit bureau in writing that you dispute the accuracy of information in your credit file. The credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. The credit bureau may not charge any fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the credit bureau.

"If the credit bureau's reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the credit bureau, to be kept in your file, explaining why you think the record is inaccurate. The credit bureau must include a summary of your statement about disputed information with any report it issues about you.

"The Federal Trade Commission regulates credit bureaus and credit repair organizations. For more information contact:

"The Public Reference Branch

"Federal Trade Commission

"Washington, D.C. 20580".

(b) Separate statement requirement

The written statement required under this section shall be provided as a document which is separate from any written contract or other agreement between the credit repair organization and the

consumer or any other written material provided to the consumer.

(c) Retention of compliance records

(1) In general

The credit repair organization shall maintain a copy of the statement signed by the consumer acknowledging receipt of the statement.

(2) Maintenance for 2 years

The copy of any consumer's statement shall be maintained in the organization's files for 2 years after the date on which the statement is signed by the consumer.

15 U.S.C. § 1679d

Credit repair organizations contracts

(a) Written contracts required

No services may be provided by any credit repair organization for any consumer—

(1) unless a written and dated contract (for the purchase of such services) which meets the requirements of subsection (b) of this section has been signed by the consumer; or

(2) before the end of the 3-business-day period beginning on the date the contract is signed.

(b) Terms and conditions of contract

No contract referred to in subsection (a) of this section meets the requirements of this subsection unless such contract includes (in writing)—

(1) the terms and conditions of payment, including the total amount of all payments to be made by the consumer to the credit repair organization or to any other person;

(2) a full and detailed description of the services to be performed by the credit repair organization for the consumer, including—

(A) all guarantees of performance; and

(B) an estimate of—

(i) the date by which the performance of the services (to be performed by the credit repair organization or any other person) will be complete; or

(ii) the length of the period necessary to perform such services;

(3) the credit repair organization's name and principal business address; and

(4) a conspicuous statement in bold face type, in immediate proximity to the space reserved for the consumer's signature on the contract, which reads as follows: "You may cancel this contract without penalty or obligation at any time before midnight of the 3rd business day after the date on which you signed the contract. See the attached notice of cancellation form for an explanation of this right.".

15 U.S.C. § 1679e

Right to cancel contract

(a) In general

Any consumer may cancel any contract with any credit repair organization without penalty or obligation by notifying the credit repair organization of the consumer's intention to do so at any time before midnight of the 3rd business day which begins after the date on which the contract or agreement between the consumer and the credit repair organization is executed or would, but for this subsection, become enforceable against the parties.

(b) Cancellation form and other information

Each contract shall be accompanied by a form, in duplicate, which has the heading "Notice of Cancellation" and contains in bold face type the following statement:

"You may cancel this contract, without any penalty or obligation, at any time before midnight of the 3rd day which begins after the date the contract is signed by you.

"To cancel this contract, mail or deliver a signed, dated copy of this cancellation notice, or any other written notice to [name of credit repair organization] at [address of credit repair organization] before midnight on [date]

"I hereby cancel this transaction,

[date]

[purchaser's signature].".

(c) Consumer copy of contract required

Any consumer who enters into any contract with any credit repair organization shall be given, by the organization—

(1) a copy of the completed contract and the disclosure statement required under section 1679c of this title; and

(2) a copy of any other document the credit repair organization requires the consumer to sign, at the time the contract or the other document is signed.

15 U.S.C. § 1679f

Noncompliance with this subchapter

(a) Consumer waivers invalid

Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.

(b) Attempt to obtain waiver

Any attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter shall be treated as a violation of this subchapter.

(c) Contracts not in compliance

Any contract for services which does not comply with the applicable provisions of this subchapter—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.

15 U.S.C. § 1679g

Civil liability

(a) Liability established

Any person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person in an amount equal to the sum of the amounts determined under each of the following paragraphs:

(1) Actual damages

The greater of—

(A) the amount of any actual damage sustained by such person as a result of such failure; or

(B) any amount paid by the person to the credit repair organization.

(2) Punitive damages

(A) Individual actions

In the case of any action by an individual, such additional amount as the court may allow.

(B) Class actions

In the case of a class action, the sum of—

(i) the aggregate of the amount which the court may allow for each named plaintiff; and

(ii) the aggregate of the amount which the court may allow for each other class member, without regard to any minimum individual recovery.

(3) Attorneys' fees

In the case of any successful action to enforce any liability under paragraph (1) or (2), the costs of the action, together with reasonable attorneys' fees.

(b) Factors to be considered in awarding punitive damages

In determining the amount of any liability of any credit repair organization under subsection (a)(2) of this section, the court shall consider, among other relevant factors—

(1) the frequency and persistence of noncompliance by the credit repair organization;

(2) the nature of the noncompliance;

(3) the extent to which such noncompliance was intentional; and

(4) in the case of any class action, the number of consumers adversely affected.

15 U.S.C. § 1679h

Administrative enforcement

(a) In general

Compliance with the requirements imposed under this subchapter with respect to credit repair organizations shall be enforced under the Federal Trade Commission Act by the Federal Trade Commission.

(b) Violations of this subchapter treated as violations of Federal Trade Commission Act

(1) In general

For the purpose of the exercise by the Federal Trade Commission of the Commission's functions and powers under the Federal Trade Commission Act, any violation of any requirement or prohibition imposed under this subchapter with respect to credit repair organizations shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act.

(2) Enforcement authority under other law

All functions and powers of the Federal Trade Commission under the Federal Trade Commission Act shall be available to the Commission to enforce compliance with this subchapter by any person subject to enforcement by the Federal Trade Commission pursuant to this subsection, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of any Federal Trade Commission trade regulation rule, without regard to whether the credit repair organization—

(A) is engaged in commerce; or

(B) meets any other jurisdictional tests in the Federal Trade Commission Act.

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any

person has violated or is violating this subchapter, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover damages for which the person is liable to such residents under section 1679g of this title as a result of the violation; and

(C) in the case of any successful action under subparagraph (a) or (b), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Commission

(A) Notice to Commission

The State shall serve prior written notice of any civil action under paragraph (1) upon the Federal Trade Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action.

(B) Intervention

The Commission shall have the right—

(i) to intervene in any action referred to in subparagraph (a);

(ii) upon so intervening, to be heard on all matters arising in the action; and

(iii) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation

Whenever the Federal Trade Commission has instituted a civil action for violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission for any violation of this subchapter that is alleged in that complaint.

15 U.S.C. § 1679i

Statute of limitations

Any action to enforce any liability under this subchapter may be brought before the later of—

(1) the end of the 5-year period beginning on the date of the occurrence of the violation involved; or

(2) in any case in which any credit repair organization has materially and willfully misrepresented any information which—

(A) the credit repair organization is required, by any provision of this subchapter, to disclose to any consumer; and

(B) is material to the establishment of the credit repair organization's liability to the consumer under this subchapter, the end of the 5-year period beginning on the date of the discovery by the consumer of the misrepresentation.

15 U.S.C. § 1679j

Relation to State law

This subchapter shall not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with any law of any State except to the extent that such law is inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

OPPOSITION BRIEF

No. 10-948

IN THE

Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
Petitioners,

v.

WANDA GREENWOOD, *et al.*,
Respondents.

BRIEF IN OPPOSITION

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RESTATED QUESTION PRESENTED

Whether the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, by the terms of its text prohibits arbitration of claims brought under it.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 615 F.3d 1204, and is reprinted in the Appendix hereto ("App.") at 1a-24a. The opinion of the United States District Court for the Northern District of California is reported at 617 F. Supp. 2d 980, and is reprinted at App. 25a-37a.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions of the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are reproduced in the Appendix. App. 39a-57a.

INTRODUCTION

The Ninth Circuit held below that the text of the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.* ("CROA"), demonstrates Congressional intent to preclude arbitration of claims brought under it. This decision conflicts with decisions of the Third and Eleventh Circuits. But the Ninth Circuit reached its decision by applying well-accepted rules of statutory construction, while the Third and Eleventh Circuits did not. The decision of the Ninth Circuit is therefore correct. And while a conflict between the circuits exists, the conflict does not present "compelling reasons" for this Court to invest its valuable resources in resolving it, as Rule 10 contemplates for review to be granted. Among other things, petitioners' prediction of an explosion of CROA class actions being forum-shopped to the Ninth Circuit is exaggerated and factually unsupported. The concerns of the *amici* are factually or legally unsupported, or are immaterial. Of particular relevance here, the CROA is a very seldom-used statute. Respondents therefore submit that this Court should, in the exercise of its discretion, deny review.

STATEMENT OF THE CASE

1. The CROA was enacted "to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services," and "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations." 15 U.S.C. § 1679(b). The CROA defines a "credit repair organization" as an entity that provides services "for the express or implied purpose of improving any consumer's credit record, credit history, or credit rating," or that provides "advice or assistance to any consumer" with regard to such services. *Id.* § 1679a(3)(A)(i), (ii).

The CROA prohibits certain unfair or deceptive practices by credit-repair organizations. *Id.* § 1679b. The CROA also specifies certain rights possessed by consumers of credit-repair services, *id.* § 1679c(a), and at various places in the statute sets out other protections provided to such consumers.

The CROA contains three interlocking provisions that control the Question Presented in this case. First, the CROA requires credit-repair organizations, before entering into any agreement with a consumer, to provide the consumer with a written statement disclosing four rights of consumers created by the CROA and related statutes. *Id.* § 1679c(a). The disclosure provision requires that the consumer be informed of the following right in the following language: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations." *Id.*

Second, the specific term "right to sue" refers to the CROA's more general civil-liability provision, which states: "Any person who fails to comply with any provi-

sion of [the CROA] with respect to any other person shall be liable to such person" in an amount determined by methods then set out. *Id.* 1679g.

Third, the CROA contains a precisely worded and extremely broad anti-waiver provision, which provides: "Any waiver by any consumer of any protection provided by or *any right* of the consumer under [the CROA] shall be treated as void," and "may not be enforced by any Federal or State court or any other person." *Id.* § 1679f(a) (emphasis added).

2.a. Petitioner CompuCredit Corporation marketed and serviced a subprime credit card with the brand name Aspire Visa. App. 2a. Petitioner Synovus Bank's predecessor in interest, Columbus Bank and Trust, issued the Aspire Visa card. App. 2a-3a. Respondents each applied for and received an Aspire Visa card. Respondents agreed that any dispute arising from or related to their credit-card accounts would be arbitrated. The arbitration agreement reads as follows:

> Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, will be resolved by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure ("NAF Rules") of the National Arbitration Forum ("NAF") in effect when the Claim is filed. If for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure.
>
> Upon such an election, neither you nor we will have the right to litigate in court the claim being arbitrated, including a jury trial, or to engage in prearbitra-

> tion discovery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or member of any class of claimants relating to any claim subject to arbitration. Except as set forth below, the arbitrator's decision will be final and binding. Other rights available to you in court might not be available in arbitration.
>
> App. 4a-5a.

The agreement also provides: "This Agreement, and your Account, and any claim, dispute or controversy (whether in contract, tort or otherwise) . . . are governed by and construed in accordance with applicable federal law and the laws of Georgia." App. 5a.

b. The agreement's designation of the National Arbitration Forum ("NAF") as the arbitration-service provider renders inaccurate petitioners' representations that there is an undisputedly valid arbitration agreement between them and respondents. Petition at i (the Question Presented refers to "a valid arbitration agreement"), 15-16 ("there is no dispute that the agreements between respondents and petitioners call for arbitration of actions like this one"). As outlined below, petitioners moved the district court to compel arbitration of respondents' CROA claims, the district court denied the motion, and petitioners appealed. After the district court's ruling, and while the appeal was pending, the NAF stopped arbitrating consumer disputes. The NAF thus became unavailable as an arbitration-service provider in this case.

This development resulted in an appellate-briefing dispute between the parties in the Ninth Circuit as to whether the parties' arbitration agreements were valid even if the CROA did not preclude arbitration of claims brought under it. *Greenwood v. Compucredit Corp.*, No. 09-15906, Dkt. No. 15 at 6-30, Dkt. No. 20 at 7-12 (9th

Circuit). The agreement provides for a substitute arbitration-service provider, should the NAF become unavailable, subject to two criteria as specified above. One of respondents' briefing points was that the district court would have to resolve in the first instance whether a "nationally recognized arbitration organization" with a "similar code of procedure" to that of the NAF, as required by the parties' agreements, exists to be substituted as the arbitration-service provider. *Id.*, Dkt. No. 15, 28-30. Respondents argued that if such an entity does not exist, the arbitration agreements are unenforceable. *Id.* at 29. The court of appeals did not reach this issue, and it remains unresolved.

It is for this reason that respondents have restated the Question Presented to delete petitioners' predicate of "a valid arbitration agreement."

3. Respondents filed suit against petitioners alleging several violations of the CROA, most prominently deceptive practices by petitioners in their marketing of the Aspire Visa card, with regard to certain fees assessed by the card.[1] App. 3a. Respondents sought to represent a nationwide class of Aspire Visa cardholders. App. 29a.

Petitioners moved the district court to compel arbitration of respondents' CROA claims. The district court denied the motion, holding that the CROA establishes a "non-waivable right to sue" in court for violations of the statute, which rendered respondents' arbitration agreements void and unenforceable. App. 37a. Petitioners took an interlocutory appeal of the district court's refusal to compel arbitration.

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[1] Respondents also alleged violations of California law, on behalf of a California-only proposed class, which are not raised in the Question Presented and are not at issue. Petitioners did not move to compel arbitration of the claims asserted under California law. App. 29a-30a.

4. A panel of the court of appeals affirmed the district court's ruling in a two-to-one split. App. 1a-24a. The panel majority consisted of Judge Kleinfeld and Judge Thomas. Judge Tashima dissented. Petitioners subsequently moved for panel rehearing and rehearing en banc, which were denied. App. 38a.

In reaching its conclusion, the court of appeals considered the "liberal federal policy favoring arbitration agreements," and followed this Court's directive for determining whether Congress intended to preclude a waiver of judicial remedies for statutory rights: the Congressional intent to preclude waiver must be discoverable in the text of the statute, its legislative history, or an inherent conflict between arbitration and the statute's underlying purposes. App. 6a-7a. The court then engaged in a straightforward analysis which showed that precise intent is apparent from the text of the CROA. App. 7a-14a.

The court began by examining the statute as a whole, and by applying the well-established rule of construction that terms not defined within a statute are accorded their plain and ordinary meaning. App. 8a. The court noted that the CROA's anti-waiver provision applies to "any right" of the consumer under the statute, so the plain language of the anti-waiver provision encompasses the "right to sue" previously specified in the disclosure provision. App. 12a. The term "to sue" is not defined in the statute, so the court read it as having its plain and ordinary meaning: to bring an action in a court of law. App. 8a-9a. An arbitration, the court observed, is an entirely different creature, a proceeding which does not take place in a court of law. App. 9a. The court concluded that Congress clearly evinced its intention to preclude a waiver of judicial remedies, by mandating that any waiver of a consumer's right to sue is void. App. 13a-14a.

The court of appeals further reasoned that the term "right to sue" is not merely a "simplified shorthand" for the more general language of the CROA's civil-liability provision, because the plain and ordinary meaning of the term "right to sue" would then become superfluous. App. 10a-11a. The court also addressed the anti-waiver provision's language that a waiver of any consumer right may not be enforced by any federal or state court "or any other person." App. 12a-13a. The court rejected the argument that the "any-other-person" language demonstrates a Congressional intent for arbitrators to decide CROA claims. This is because, the court reasoned, the CROA creates non-waivable consumer rights and protections other than the right to sue, and one of those other rights or protections could arise in an arbitration proceeding instituted by a credit-repair organization or debt-collection agency for collection of the organization's fees under its contract with the consumer. App. 13a. The "any-other-person" language does not require a different construction because of the plain and ordinary meaning of the non-waivable right to sue: a consumer's right to bring an action in a court of law. App. 13a.

The court of appeals candidly recognized that its decision conflicted with the decisions in *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), and *Picard v Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009). The court explained that *Gay* and *Picard* gave too little regard to the "right-to-sue" language in the statute, and relied upon reasoning in decisions by this Court that addressed statutes which are quite different from the CROA. App. 14a. The court of appeals went on to explain in considerable detail why those decisions of this Court are distinguishable. App. 14a-17a.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Decision of the Ninth Circuit Conflicts With the Decisions of the Third and Eleventh Circuits, But the Conflict Does Not Present the "Compelling Reasons" For Granting the Petition Contemplated by Rule 10.

1.a. Petitioners argue that the petition should be granted because: (1) The decision of the Ninth Circuit squarely conflicts with the decisions of the Third and Eleventh Circuits. (2) Claims brought under the CROA will greatly multiply in the future, so the issue of whether CROA claims can be arbitrated will become correspondingly more important. (3) Forum-shopping class-action plaintiffs will flock to the arbitration-free domain of the Ninth Circuit, such that the Ninth Circuit's rule will become the *de facto* nationwide rule. (4) The parties to a CROA claim should not be treated differently on the arbitration issue depending on where the suit is filed. (5) This case presents a particularly suitable vehicle for resolving the Question Presented.

The decision of the Ninth Circuit obviously conflicts with the decisions of the Third and Eleventh Circuits. But that alone is not enough. Upon examination, petitioners' arguments (and the arguments of the *amici*) do not demonstrate the "compelling reasons" for granting the petition contemplated by Rule 10. This is well illustrated by petitioners' argument that the number of CROA lawsuits is "ever growing." Petition at 15.

b. Petitioners note that the number of personal-bankruptcy filings has risen dramatically in the past few years, from 822,590 in 2007 to 1,412,838 in 2009, an increase of approximately 72%. *Id.* Petitioners then argue that "because the demand for credit repair services presum-

ably correlates strongly with a decline in the quality of consumer credit," as evidenced by the increase in personal-bankruptcy filings, "the number of CROA suits ... will only increase in the years to come." *Id.* But this argument is refuted by the number of CROA lawsuits that have actually been filed. The CROA has always been, and remains, a very little-used statute, especially when compared to other consumer-protection statutes.

Since the CROA's enactment in 1996, there have been 116 reported cases asserting CROA claims. This figure consists of all the cases reported (both published and unpublished) on Westlaw and LexisNexis.[2]

Circuit	Total CROA cases	Class Actions	Individual Suits	% Class Actions
First	4	2	2	50%
Second	10	3	7	30%
Third	12	6	6	50%
Fourth	8	2	6	25%
Fifth	3	1	2	33%
Sixth	10	1	9	10%
Seventh	23	11	12	48%
Eighth	5	2	3	40%
Ninth	15	8	7	53%
Tenth	4	2	2	50%
Eleventh	22	4	18	18%
TOTAL	116	42	74	36%

[2] Shepardizing CROA in these databases actually yielded 145 results, but only 116 discrete cases in which CROA claims were asserted. This is because one case can yield multiple results by having different orders and opinions reported, and because the CROA statute can simply be mentioned in a case which was not brought under the statute.

The number of CROA cases filed, and reported, per year since the statute's enactment is as follows:

Year	Number of CROA filings
1997	1
1998	4
1999	3
2000	2
2001	7
2002	2
2003	12
2004	9
2005	14
2006	5
2007	20
2008	22[3]
2009	11
2010	4
Total	116

Detailed information on the CROA filings by year and by circuit is set out in the Appendix. App. 58a-79a.

According to petitioners' argument based on personal-bankruptcy statistics, there should have been an explosion of CROA lawsuits from 2007 through 2009. There was not. Petitioners' corresponding argument that there will be an explosion of CROA lawsuits in the future, rendering the Question Presented one of national impor-

[3] The 2008 figure includes 11 individual CROA lawsuits filed in the Southern District of Florida by one attorney, Bryan Manno. The 2008 figure may be skewed upward for that reason.

tance, cannot be reconciled with what happened from 2007 through 2009. Petitioners' prediction of a deluge of CROA lawsuits is a chimera.

It is also instructive to compare the number of CROA lawsuits with suits filed under two other consumer-protection statutes, the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* The three statutes were compared by Shepardizing each statute on LexisNexis. The number of search results does not correspond to the exact number of cases filed, for the reasons explained above. Although the search results overreport to some extent the number of lawsuits filed, they do, however, clearly show that on a comparative basis, the CROA is a little-used statute:

Without any date restrictions, the following results were yielded: (1) TILA: over 3,000. (2) FCRA: 2,490. (3) CROA: 145.

A search from January 1, 2006, until February 23, 2011, yielded the following results: (1) TILA: 2,266. (2) FCRA: 1,358. (3) CROA: 91.

A search from January 1, 2001, to December 31, 2005, yielded the following results: (1) TILA: 979. (2) FCRA: 658. (3) CROA: 48.

A search from January 1, 2007, to December 31, 2009, yielded the following results: (1) TILA: 1,212. (2) FCRA: 728. (3) CROA: 58.

c. Petitioners also summon the bugbear of class-action forum shopping, as does *amicus curiae* the Consumer Data Industry Association ("CDIA"). But the specter of a mass migration of CROA class-action forum-shoppers to the Ninth Circuit is not supported by the number of CROA lawsuits that have been filed in the past, by the per-

centage of those lawsuits that were class actions (36%), by the number of CROA lawsuits that will expectably be filed in the future based on the 2007-2009 experience, or by a comparison of CROA filings with TILA and FCRA filings. Moreover, one would expect most class actions that are truly forum-shopped to the Ninth Circuit to be transferred elsewhere under 28 U.S.C. §1404(a).[4]

A class action based on a federal claim such as this one would be brought in a judicial district where any defendant resides, if all defendants reside in the same state, or, in a judicial district where a substantial part of the events or omissions giving rise to the named plaintiff's claim occurred. *See* 28 U.S.C. § 1391(b). Certainly many corporate defendants (and most CROA defendants would be corporations) would be deemed to reside in a judicial district in the Ninth Circuit, under the statutory venue provisions applicable to corporations. *See* 28 U.S.C. § 1391(c). However, 28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." This would result in many, if not most, forum-shopped CROA class actions being transferred either to the judicial district where the named plaintiff resided when the CROA violation occurred, or to a judicial district where a defendant has its principal place of business.

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[4] A truly forum-shopped case would be filed in a district with no real connection to the controversy, only a technical connection under the venue statute because the corporate defendant did business there. And presumably this is what petitioners are referring to. Of course, lawyers could always look for a named class-action plaintiff residing in the Ninth Circuit. But this would present considerably less opportunity than transplanting a case that arose in the lawyer's home territory, and it would arguably not be forum shopping at all because the CROA cause of action would arise where the named plaintiff resided.

Upon a §1404(a) transfer from the Ninth Circuit, the transferee district court would apply its own circuit's interpretation of federal law, including the CROA, not the Ninth Circuit's. *See* Murphy v. F.D.I.C., 208 F.3d 959, 964-66 (11th Cir. 2000) (collecting cases). The class-action forum-shopper would gain nothing. As *Murphy* and the cases it discusses demonstrate, the disparate application of federal law from circuit to circuit is simply a fact of life in some instances, with binding precedent for all set only by this Court, on issues it deems of sufficient importance. But for all the reasons discussed, the successful forum-shopping of a multitude of CROA class actions to take advantage of the Ninth Circuit's holding on arbitration is unlikely to materialize as predicted by petitioners, which renders the Question Presented less needful of this Court's attention than petitioners would have it.

d. Finally, whether this case presents a "highly suitable vehicle" for resolving the Question Presented, as petitioners argue, is debatable. The decision by the NAF to stop arbitrating consumer disputes may ultimately render the parties' arbitration agreements unenforceable, even if this Court determined that the CROA does not prohibit arbitration of claims brought under it. This is because the agreements require a substitute arbitration-service provider to be a "nationally recognized arbitration organization" with a "similar code of procedure" to that of the NAF. It is by no means certain that such an entity exists.

If this Court grants the petition, it will resolve the Question Presented for parties that may not ultimately have a stake in that resolution, because the arbitration agreements may not be enforceable in any event. Resolving the Question Presented will not resolve the arbitration issue for the parties. Respondents therefore submit that this Court should await a case wherein a res-

olution of the Question Presented will finally resolve the arbitration dispute between the parties to that case.

2.a. The two *amici curiae* take divergent approaches to the petition. The CDIA argues that the petition should be granted because the court of appeals' decision will actually harm consumers. This is so, it says, because its members provide credit-related products and services to consumers, and are able to charge affordable prices because arbitration agreements allow them to hold down litigation costs if disputes arise. Therefore, the CDIA says, if arbitration is foreclosed, the availability of these products and services may be drastically reduced or even eliminated. The accuracy of this sky-is-falling prediction is obviously open to question. But more to the point, the CDIA's members do not appear to be credit-repair organizations, the only kind of entity that can be sued in a court of law under the CROA's right-to-sue and anti-waiver provisions.

The CDIA's website, www.cdiaonline.org, reveals that its members do not fit the definition of credit-repair organizations, which provide services to consumers for the purpose of improving a consumer's credit record, credit history or credit rating. *See* 15 U.S.C. § 1679a(3)(A)(i), (ii). According to the CDIA's website, it represents "consumer information companies that provide fraud prevention and risk management products, credit and mortgage reports, tenant and employment screening services, check fraud and verification services, and collection services." The CDIA does not explain how these activities bring its members within the definition of a credit-repair organization, and in fact, its website cautions consumers "to be wary of companies that make claims indicating they can 'repair' your credit." This is unusual advice from those who claim to be exposed to CROA lawsuits that are reserved for credit-repair organi-

zations. The CDIA appears to be oversensitive to concerns that are more hypothetical than real.

b. *Amicus curiae* DRI argues the prevalence and utility of arbitration. But this is irrelevant if Congress evinced an intent in the text of the CROA to preclude arbitration of claims brought under it, which Congress has the power to do. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 624, 628 (1985). DRI also argues that the Ninth Circuit's decision will throw contracts made under other statutes "into turmoil," and that the Ninth Circuit's decision conflicts with this Court's entire approach to the arbitration of statutory claims. These points are addressed below, in respondents' discussion of the merits of the Ninth Circuit's decision.

3. In sum, respondents submit that there are several real-world reasons why this Court should deny the petition and not expend its valuable resources on resolving the Question Presented. The policy concerns of the *amici curiae* are exaggerated or irrelevant. And, as discussed below, the Ninth Circuit reached the right result in this case.

B. The Court of Appeals Correctly Held That the Text of the CROA Prohibits Arbitration of Claims Brought Under It.

1.a. The CROA, with its three linked provisions – – the "right to sue" specified in the disclosure provision, the civil-liability provision, and the anti-waiver provision – – is a unique statute, different from any statute which this Court has previously considered in determining whether Congress evinced an intent to preclude waiver of judicial remedies for the statutory claims at issue. Petitioners' entire argument is based on de-linking these three provisions, one from another. Petitioners view each of these three provisions in isolation, contrary to the accepted

rule that a statute must be construed as a whole. *Samanatar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010). If these three provisions are read together, as they should be, petitioners' argument unravels.

b. The court of appeals correctly gave the term "to sue" in the disclosure provision its ordinary meaning, according to *Black's Law Dictionary* and usual parlance, because that term is not defined in the CROA. *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) ("regular usage" determines the meaning of an undefined statutory term). The ordinary meaning of a "right to sue," for the reasons explained by the court of appeals, is a right to bring an action in a court of law. And it is illogical to posit that Congress intended the term "right to sue" to have any meaning other than its ordinary meaning. This is because the term is set out in a disclosure statement that must be provided to consumers, and a Congressional purpose in enacting the CROA was to provide consumers with sufficient information to make an informed decision regarding the purchase of credit-repair services. Part of the information necessary to make that decision is thus the consumer's right to bring an action *in a court of law* against a credit-repair organization that violates the CROA. Defining "right to sue" to mean a right to an alternative, non-judicial, dispute-resolution procedure would mean Congress was at best cryptic and at worst misleading with ordinary consumers in the disclosure statement, in direct contravention of the informative Congressional purpose in enacting the CROA.[6]

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[6] The ordinary meaning of the word "sue" is also illustrated by this Court's use of the term to distinguish an action brought in court from an arbitration proceeding. *See, e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 294 (1995) (observing that § 4 of the Federal Arbitration Act "holds the defendants to their promise to submit to arbitration rather than making the other party sue them.").

The term "right to sue" thus has a quite specific meaning which controls the general language of the CROA's generic civil-liability provision. *Bloate v. U.S.*, 130 S. Ct. 1345, 1354 (2010) (a specific provision in a statute controls one of more general application). The court of appeals did not expressly rely on this rule of statutory construction, but it is consistent with the court of appeals' reasoning. The "right-to-sue" provision is also more specific than the general civil-liability provision, and thus controls the latter, because it only confers a right to sue (bring an action in a court of law against) a credit-repair organization, while the general civil-liability provision allows a claim to be brought against "[a]ny person" that violates the CROA. *See* 28 U.S.C. § 1679g(a).

Amicus curiae DRI says "mainstream" dictionaries should be used to define the term "sue," not *Black's Law Dictionary*, and it cites four dictionary definitions of "sue," two of which might accommodate arbitration. But one of the cited dictionary definitions refers to "[i]nstituting a *suit*," while another recites, "bring a *civil action* against." Brief of *amicus curiae* DRI at 11 (emphasis added). "Suit" and "civil action" are terms from judicial proceedings that are incompatible with arbitration. Other non-legal dictionary definitions also exclude arbitration. The *American Heritage Dictionary of the English Language* defines "sue" as "[t]o petition (a court) for redress of grievances or recovery of a right." *Webster's New World College Dictionary* (4th ed.) defines "sue" as "to petition (a court) for legal redress."

Moreover, *Black's Law Dictionary* is a well-accepted, uniform and specific tool for determining the ordinary meaning of statutory terms. This Court regularly relies on *Black's* for this purpose. *See, e.g., CSX Transp., Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1108 (2011) (using *Black's* to determine the ordinary meaning of the

statutory term "discriminates"); *Lopez v. Gonzales*, 549 U.S. at 54 (using *Black's* to determine what the statutory term "trafficking" ordinarily means). And as the court of appeals pointed out, courts and other authorities have consistently distinguished arbitration from suing in a court of law. App. 9a. The most cogent interpretive authority confirms that the ordinary meaning of "sue" is what a layman, to whom the CROA disclosure statement must be given, means when he tells another layman, "I'll sue you" – – and he does not mean, "I'll take you to arbitration."

c. The anti-waiver provision is linked to the "right to sue" provision specified in the disclosure statement, which in turn modifies the CROA's generic civil-liability provision, because the anti-waiver provision renders void any waiver of "any right of the consumer under [the CROA]," and the only consumer rights specified in the CROA are specified in the disclosure provision. Congress's intent to preclude a waiver of judicial remedies for claims arising under the CROA is thus clearly evinced by the text of the statute read as a whole.

d. In an attempt to override the statutory text with the federal presumption favoring arbitration, petitioners point out that in recent memory this Court has not once rejected the arbitrability of a federal statutory cause of action. But this point only goes so far. All of this Court's cases relied upon by petitioners, and *amici*, addressed statutes which are materially distinguishable from the CROA's unique framework of correlated provisions, as explained in considerable detail by the court of appeals. App. 17a-19a. Petitioners then say that nothing in the CROA's text (because the civil-liability provision does not mention arbitration), history or purposes overcomes the federal presumption favoring arbitration, and "[t]hat should be the end of the matter." Petition at 18. But that

is not the end of the matter, because the specific "right-to-sue" provision controls and modifies the CROA's generic civil-liability provision.[6] Petitioners then argue that the "right-to-sue" provision does not create any right, it only describes the cause of action available under the CROA's civil-liability provision. But the "right-to-sue" provision is not merely descriptive. This is because of the accepted rule of statutory construction that this specific provision controls and modifies the generic civil-liability provision. Petitioners further observe that any statutory cause of action can properly be described as a "right to sue." But that is true only as a generic observation, and does not take into account this *particular* statute when standard rules of statutory construction are applied to it.

e. As for the CROA's anti-waiver provision, petitioners (and *amici*) view that provision in isolation by saying the CROA does not create a right to a judicial forum. But this argument collides with accepted rules of statutory construction, as discussed above. Petitioners then say the anti-waiver provision demonstrates Congressional intent for CROA claims to be arbitrable, because the provision states that any waiver of any right of the consumer "may not be enforced by any Federal or State court or *any other person*." 15 U.S.C. § 1679f(a) (emphasis added). However, as the court of appeals explained, the CROA creates non-waivable consumer rights and protections other than the right to sue, which could arise in an arbitration proceeding brought by a credit-repair organization against a consumer, for example, to collect the organization's

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[6] Applying this rule of statutory construction, the CROA's text is clear. Its legislative history is therefore irrelevant. *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (appeals to legislative history are well taken only to resolve statutory ambiguity).

fees under its contract with the consumer.[7] This view of the "any-other-person" language is consistent with the term "right to sue" having its ordinary meaning, and with that term being a specific provision which controls and modifies the far more general language of the civil-liability provision. It is thus the only view which conforms to recognized methods of statutory construction. Petitioners' view of the "any-other-person" language does not do this. Petitioners' view would have a general provision (the generic civil-liability provision) control a specific provision (the "right-to-sue" provision).[8]

Petitioners next argue that the title of the section in which the anti-waiver provision appears, "noncompliance

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[7] The anti-waiver provision speaks of "any *protection* provided by *or* any *right* of the consumer." 15 U.S.C. § 1679f(a) (emphasis added). Among the non-waivable consumer protections provided by the CROA, which could arise in an arbitration proceeding instituted by the credit-repair organization against the consumer for collection purposes, are: No payment can be required until the credit-repair service is fully performed. *Id.* § 1679b(b). A credit-repair-services contract must estimate when the services will be completed. *Id.* § 1679d(b)(2)(B). The contract must state the total amount of all payments, *i.e.*, there can be no open-end contract. *Id.* § 1679d(a)(b)(1). The contract must contain "a full and detailed description of the services to be performed," *i.e.*, there can be no vague summary of amorphous services undertaken. *Id.* § 1679d(b)(2). A waiver of any of these protections would constitute a defense to a collection proceeding, because the contract would be void. *Id.* 1679f(c). DRI's *amicus* brief also supports the court of appeals' view of the "any-other-person" language. DRI observes that between 2003 and 2007, the NAF administered 33,948 arbitrations, and all but 15 were collection proceedings instituted against the consumer. Brief of *amicus curiae* DRI at 5.

[8] *Amicus curiae* the CDIA argues that the "any-other-person" language creates doubts about arbitrability that must be resolved in favor of arbitration. But there are no such doubts when accepted rules of statutory construction are applied to this language.

with this subchapter," shows the anti-waiver provision concerns itself only with waivers of "compliance" with the CROA's substantive provisions. Therefore, petitioners say, the anti-waiver provision does not address arbitration agreements, because arbitration agreements do not waive compliance with a statute's substantive provisions, but provide for their enforcement in an arbitral forum. The two cases upon which petitioners rely, *see* Petition at 21-22, involved statutes clearly distinguishable from the CROA, as explained by the court of appeals. App. 15a-17a. But more to the point, the title of a statute and the heading of a statutory section can be used for interpretive purposes only when the statute or section is ambiguous. *Whitman v. American Trucking Assns.*, 531 U.S. 457, 483 (2001); *Bhd. of R.R. Trainmen v. Baltimore & Ohio R., Co.*, 331 U.S. 519, 528-29 (1947). Petitioners do not explain why the precisely worded anti-waiver provision is ambiguous, which they must do in order to invoke the title of the section as an interpretive tool. And it is not ambiguous. As noted, the anti-waiver provision refers to "any right of the consumer under [the CROA]," and the only consumer rights specified in the CROA are specified in the disclosure provision, which includes the "right to sue." Moreover, the anti-waiver provision also refers to any consumer "protection" provided by the CROA, and the CROA provides various protections that are not denominated as rights, in various of its provisions. This is not ambiguity.

f. Petitioners conclude by saying two things. First, they say Congress was aware of the presumption in favor of arbitration when it enacted the CROA, but it was silent on the arbitration of CROA claims, thus indicating arbitration is not precluded. But when the statute is read as a whole, as discussed above, its text shows Congress was not silent. And, petitioners argue that any doubts about whether the anti-waiver provision precludes arbitration

of CROA claims must be resolved in favor of arbitration. This is correct, but reading the statute as a whole leaves no such doubts.

g. The Third and Eleventh Circuits in *Gay* and *Picard* fell into the same piecemeal analysis advanced by petitioners, and like petitioners, failed to appreciate the proper, limited role of section titles as interpretive aids. The Ninth Circuit painstakingly analyzed the statute as a whole, in accordance with accepted rules of statutory construction. The fact that arbitrability issues must be addressed with a "healthy regard" for the federal policy favoring arbitration, as the Ninth Circuit recognized, does not mean the accepted rules of statutory construction should be bent or broken in that endeavor.

2.a. This brings us to certain separate points argued by the *amici*. Both DRI and the CDIA apply the same piecemeal analysis as petitioners, viewing each relevant statutory provision in isolation, without employing some or all of the governing rules of statutory construction. And *amici* expressly (the CDIA) or impliedly (DRI) accuse the court of appeals of displaying the judicial hostility to arbitration that the Federal Arbitration Act was intended to overcome, despite the court of appeals' express recognition of the liberal federal policy favoring arbitration and its placement of the burden of proof on respondents.

b. The CDIA says the Ninth Circuit framed the dispositive issue in a way that could only lead to an unjustified and unsupported result. According to the CDIA, the court of appeals improperly framed the dispositive issue as what the word "sue," as used in the CROA, means. DRI agrees, arguing that the "right-to-sue" language is the "wrong starting point," because, it says, the substantive right is created by the arbitration-friendly general language of the civil-liability provision, which the "right-to-

sue" provision "merely incorporate[s]." Brief of *amicus curiae* DRI at 10. But by any measure the meaning of the word "sue" is the ultimate issue in this case. The *Gay* and *Picard* courts both addressed the meaning of "sue" as used in the statute, as they had to do to resolve the issue before them. The CDIA and DRI simply disagree with the Ninth Circuit's use of standard rules of statutory construction to determine the meaning of the word "sue," a method of analysis not followed by the Third and Eleventh Circuits.

c. The CDIA argues that it is irrelevant to the Ninth Circuit whether a defendant is actually a credit-repair organization subject to the CROA, because the assertion of a CROA claim will be sufficient to defeat arbitration, and then postulates dire results from this state of affairs. As an initial matter, respondents observe that the Ninth Circuit did not reach the issue of whether petitioners were credit-repair organizations because the district court did not address that issue. App. 7a. In the district court, petitioners took the position that it was unnecessary to decide this issue. *See Greenwood v. Compucredit Corp.*, No.4:08-cv-4878, Dkt. No. 53, at 2 (N.D. Cal.). The district court allowed petitioners to raise the issue in later proceedings. *Id.*, Dkt. No. 76 at 2.

The CDIA says, if a defendant won summary judgment on a CROA claim because it proved it was not a credit-repair organization, the district court that had previously denied a motion to compel arbitration would then have to stay the judicial proceedings and compel arbitration of the remaining claims at some point down the road in the litigation. The CDIA says this result conflicts with the Congressional policy favoring arbitration as set forth in the Federal Arbitration Act, and defendants should not be forced to participate in litigation until they establish that they are not subject to the CROA.

The first flaw in this argument is that courts are routinely presented with motions to compel arbitration when the complaint alleges both arbitrable and non-arbitrable claims, and courts routinely compel arbitration of the arbitrable claims while allowing the remaining claims to proceed in litigation. All the claims asserted, both arbitrable and non-arbitrable, do not proceed in litigation, as the CDIA's hypothetical erroneously posits. It is only claims brought against a credit-repair organization under the CROA that are not arbitrable.

Second, because Congress has specified that claims brought against a credit-repair organization under the CROA are not arbitrable, the fact that a defendant would have to participate in litigation until it showed it was not a credit-repair organization and obtained a dismissal is simply irrelevant. In any event, this would logically be treated as a threshold issue to be determined as an initial matter, instead of far down the road in the litigation process. In this case, respondents raised at the outset the issue of petitioners' status as credit-repair organizations, and argued that they are subject to the CROA. *See Greenwood v. Compucredit Corp.*, No. 4:08-cv-4878, Dkt. No. 46 at 3-7 (N.D. Cal.). It was petitioners, for whatever reason, who then took the position that it was unnecessary to decide this issue at that juncture. *Id.*, Dkt. No. 53 at 2.

d. DRI argues that the term "right to sue" can be defined by the parties' contacts to mean arbitration, and that, if the term "right to sue" does mean what it says, an affirmative defense of arbitration can still be asserted. But these arguments simply disregard the CROA's anti-waiver provision, a one-provision-at-a-time approach that ignores the linkage between the "right-to-sue" provision, the general civil-liability provision, and the non-waiver provision. DRI's definition-by-contract and affirmative-defense arguments are foreclosed by the anti-waiver provision.

e. DRI further says that under the Ninth Circuit's methodology, any statute with a private right of action and a non-waiver provision can void an arbitration agreement, and because such statutes exist, the Ninth Circuit's decision will create "turmoil" with many contracts in different arenas. The "turmoil" accusation is a red herring, because DRI's preference for arbitration is immaterial if Congress in those statutes evinced an intent to preclude arbitration. But in fact, the statutes DRI cites are quite distinguishable from the CROA's unique statutory framework.

The Housing and Community Development Act of 1980 confers a private right of action, providing that unless limited by law, "any person aggrieved by a violation of this chapter may sue at law or in equity." 15 U.S.C. § 3611(a). Its anti-waiver provision states, "Any condition, stipulation, or provision binding any person to waive compliance with any provisions of this chapter shall be void." *Id.* § 1314. Unlike the CROA, this statute does not designate the ability to sue as a "right to sue," and unlike the CROA, this statute's anti-waiver provision does not invalidate any waiver of "rights" conferred by the statute, including a "right to sue." Moreover, the anti-waiver provision only addresses "compliance" with the statute's provisions. Under this Court's analysis in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987), this statute only prohibits waivers of compliance with its substative obligations, and the provision of a judicial forum is not a substative obligation. The text of the CROA's anti-waiver provision is not so limited.

The Migrant and Seasonal Agricultural Worker Protection Act provides the following private right of action: "Any person aggrieved by a violation of this chapter or any regulation under this chapter ... may file suit in any district court of the United States ...." 29 U.S.C. § 1854. The statute's anti-waiver provision provides in per-

tinent part: "Agreements by employees purporting to waive or to modify their rights under this chapter shall be void as contrary to public policy ...." *Id.* § 1856. As with the Housing and Community Development Act of 1980, the ability to file suit is not designated as a "right to sue," so the provision against waiver of "rights" under the statute does not apply to the private cause of action. The Ninth Circuit's CROA analysis is likewise inapplicable.

40 U.S.C. § 3133(b)(1) and (2) provide that persons who have supplied labor or material under a contract for which a payment bond is furnished, and who have not been paid, "may bring a civil action on the payment bond for the amount unpaid." The statute further provides that "[a] waiver of the right to bring a civil action on a payment bond required under this subchapter is void" unless the waiver is in writing, signed, and executed post-performance. *Id.* § 3133(c). Unlike the CROA, this statute does not mandate that the persons allowed to sue must be informed in writing, before the contract is executed, that they have a *right* to sue, and the statute does not have an announced Congressional purpose of providing consumers with accurate information, as does the CROA. Thus, another element of the Ninth Circuit's CROA analysis is missing. None of the statutes relied upon by DRI prohibit arbitration of claims brought under them.

f. DRI finally says the Ninth Circuit's analysis is dangerous because it conflicts with how this Court has approached the arbitrability of statutory claims in the past. But there is no conflict. The Ninth Circuit explained why the statutes previously considered by this Court are wholly distinguishable from the CROA. App. 15a-19a. The Ninth Circuit's analysis did nothing more than apply correct and accepted rules of statutory construction to a statute with a unique framework of interlocking provisions. To iterate, the federal presumption

favoring arbitration does not instruct that accepted rules of statutory construction should be bent or broken.

CONCLUSION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-15906
D.C. No. 4:08-cv-04807-CW
OPINION

WANDA GREENWOOD LADELLE HATFIELD;
DEBORAH MCCLEESE, on behalf of themselves
and other similarly situated,
Plaintiffs-Appellees,

v.

COMPUCREDIT CORPORATION and OPINION
COLUMBUS BANK AND TRUST,
jointly and individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California Claudia Wilken,
District Judge, Presiding

Argued and Submitted
April 12, 2010—San Francisco, California

Filed August 17, 2010

Before: Andrew J. Kleinfeld, A. Wallace Tashima, and
Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas;
Dissent by Judge Tashima

COUNSEL

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OPINION

THOMAS, Circuit Judge:

This appeal presents the question, *inter alia*, as to whether the word "sue," as used in the Credit Repair Organization Act ("CROA"), means "arbitrate." Or, perhaps the question is, as Alice put it: "whether you can make words mean so many different things?"[1] We conclude that Congress meant what it said in using the term "sue," and that it did not mean "arbitrate." We affirm the order of the district court denying the Credit Providers' motion to compel arbitration.

I

CompuCredit marketed a subprime credit card under the brand name Aspire Visa to consumers with low or weak credit scores through massive direct-mail solicitations and the internet.[2] CompuCredit marketed the card

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[1] Lewis Carroll, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE, IN THE ANNOTATED ALICE: THE DEFINITIVE EDITION 213 (Martin Gardner ed., Norton Publishers) (2000).

[2] At this stage in the litigation, the facts as recited here are based on the allegations in Plaintiffs' complaint.

and the cards were issued by Columbus Bank and Trust (collectively "Credit Providers").

Greenwood and her fellow plaintiffs ("Consumers") allege CompuCredit marketed the card by representing to consumers it could be used to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." Consumers allege the promotional materials noted there "was no deposit required," and that consumers would immediately receive $300 in available credit when they received the card. In fact, they allege, Credit Providers charged a $29 finance charge, a monthly $6.50 account maintenance fee, and a $150 annual fee, assessed immediately against the $300 limit before the consumer received the card. In aggregate, the card had $257 in fees the first year. Although the promotional material mentioned the fees, it did so in small print amidst other information in the advertisement, and not in proximity to its representations that no deposit was required. Consumers each applied for and received an Aspire card, and were charged these fees. Consumers allege the Credit Providers' actions constitute several violations of the CROA and of California's Unfair Competition Law.

Before receiving the Aspire Visa credit card, each Consumer received a mailing entitled "Pre-Approved Acceptance Certificate." The Acceptance Certificate includes the following paragraph:

> By signing, I request an Aspire Visa card and ask that an account be opened for me. I certify that everything I have stated in the Acceptance Certificate is true and accurate to the best of my knowledge. I have read and agree to the be bound by the "Summary of Credit Terms" and "Terms of Offer" printed on the enclosed insert, which insert includes a discussion of arbitration applicable to my account, and is incorporated here by reference.

One Consumer mailed in her acceptance, one applied over the internet, and the other applied over the phone.

The "Terms of Offer" states:

> Important — The agreement you receive contains a binding arbitration provision. If a dispute is resolved by binding arbitration, you will not have the right to go to court or have the dispute heard by a jury, to engage in pre-arbitration discovery except as permitted under the code of procedure of the National Arbitration Forum ("NAF"), or to participate as part of a class of claimants relating to such dispute. Other rights available to you in court may be unavailable in arbitration.

The "Summary of Credit Terms" contains the following:

> ARBITRATION PROVISION
> (AGREEMENT TO ARBITRATE CLAIMS)
>
> Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, will be resolved by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure ("NAF Rules") of the National Arbitration Forum ("NAF") in effect when the Claim is filed. If for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure.
>
> Upon such an election, neither you nor we will have the right to litigate in court the claim being arbitrated, including a jury trial, or to engage in prearbitration discovery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or member of any class of

> claimants relating to any claim subject to arbitration. Except as set forth below, the arbitrator's decision will be final and binding. Other rights available to you in court might not be available in arbitration.

The agreement also provides, "This Agreement, and your Account, and any claim, dispute or controversy (whether in contract, tort or otherwise) . . . are governed by and construed in accordance with applicable federal law and the laws of Georgia."

Consumers brought this action in federal district court, and the Credit Providers moved to compel arbitration of Consumers' CROA claims. The district court held the arbitration clause in the Credit Providers' Aspire Visa credit card agreements was invalid and void under the CROA's prohibition of the waiver of a consumer's right to sue in court, and denied the motion to compel arbitration. The district court also denied the Credit Providers' Motion for Leave to File Motion for Reconsideration. The Credit Providers filed a timely interlocutory appeal challenging the denial of the motion to compel arbitration.

We review the denial of a motion to compel arbitration de novo. *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 652 (9th Cir. 2009); *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 725 (9th Cir. 2007) ("Whether [a federal statute] permits adjudication by binding arbitration is a question of law that we review de novo.").

II

The district court correctly concluded that the arbitration agreement was void because the CROA specifically prohibits provisions disallowing any waiver of a consumer's right to sue in court for CROA violations.

A

We employ our usual methodology in statutory con-

struction. As always, our starting point is the plain language of the statute. *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999). "[W]e examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Id.* If the plain meaning of the statute is unambiguous, that meaning is controlling and we need not examine legislative history as an aid to interpretation unless "the legislative history clearly indicates that Congress meant something other than what it said." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (en banc). If the statutory language is ambiguous, we consult legislative history. *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999).

[1] In this context, we also note that Congress has manifested a "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (internal quotation marks omitted). Specifically, the Federal Arbitration Act declares that "[a] written provision in . . . a contract evincing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

[2] The Supreme Court has held that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 624, 628 (1985). "[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history." *Id.* More recently, the Supreme Court has reiterat-

ed that the Congressional intent to preclude waiver "will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. The burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. *Id.*

B

With these principles in mind, we turn to the Credit Reporting Organization Act. The CROA expressly identifies four rights, which appear in the disclosures section of the statute, 15 U.S.C. § 1679c. The first two rights concern rights that consumers have in relation to credit bureaus, which are not implicated by this suit. The third and fourth rights specifically concern rights that consumers have in relation to credit repair organizations.[3] The third right directly addresses the Consumers' argument: "You have the right to sue a credit repair organization that violates the Credit Repair Organization Act." 15 U.S.C. § 1679c(a). In addition, each credit repair organization is required to (1) inform the consumer of his or her right to sue, (2) provide such information to the consumer in a separate document containing a verbatim copy of an eightparagraph text specified by Congress, which enumerates the "right to sue," (3) obtain from the consumer a signature confirming receipt of such information, and (4) keep such signed confirmations on file for two years from the date of signing. 15 U.S.C. § 1679c(a)-(c). The disclosure document must be provided to every consumer "before any contract or agreement between the consumer and the credit repair organization is executed." *Id.* § 1679c(a).

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[3] The district court did not rule on whether the Credit Providers are "credit repair organizations" under the meaning of the statute. Therefore, we will not reach this issue on appeal.

The CROA also contains a non-waiver provision, phrased in unusually comprehensive and precise language: "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter– (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." 15 U.S.C. § 1679f(a).

[3] Thus, the plain language of the CROA provides consumers with the "right to sue." 15 U.S.C. § 1679c. The "right to sue" means what it says. The statute does not provide a right to "some form of dispute resolution," but instead specifies the "right to sue." The act of suing in a court of law is distinctly different from arbitration. *See Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) ("Arbitration . . . is a private system of justice" distinct from state and federal courts). The right to sue protected by the CROA cannot be satisfied by replacing it with an opportunity to submit a dispute to arbitration.

Where terms are not defined within a statute, they are accorded their plain and ordinary meaning. *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 455 (9th Cir. 1999). The plain and ordinary meaning of terms can be deduced through reference sources, including Black's Law Dictionary and general usage dictionaries. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (determining the plain meaning of a contract term by referencing *Black's and Webster's* Dictionary).

To sue is "[t]o institute a lawsuit against (another party)." BLACK'S LAW DICTIONARY 1473 (Bryan A. Garner ed., 8th ed., 2004). For "lawsuit," Black's directs us to "suit," *id.* at 905, which is defined as: "[a]ny proceeding by a party or parties against another *in a court of law.*" *Id.* at 1475 (emphasis added); *see also Weston v. City*

Council of Charleston, 27 U.S. (Pet) 449, 464 (1829) (defining "suit" as "any proceeding *in a court of justice*, by which an individual pursues that remedy in a court of justice, which the law affords him") (emphasis added). The plain meaning of the phrase "right to sue" thus clearly involves the right to bring an action in a court of law.

By contrast, "arbitration" is "[a] method of dispute resolution involving one or more neutral third parties who are usu- [ally] agreed to by the disputing parties and whose decision is binding." BLACK'S LAW DICTIONARY 112. Arbitration is one of several mechanisms of "alternative dispute resolution," which is "[a] procedure for settling a dispute *by means other than litigation*, such as arbitration or mediation." *Id.* at 86 (emphasis added). The Corpus Juris Secondum underscores that "[a]rbitration is not a judicial proceeding either at common law or under statutes. It is a proceeding separate from litigation based upon its underlying purpose of encouraging dispute resolution *without result to the courts*, and may be characterized as an alternative to litigation." 6 C.J.S. Arbitration § 2 (June 2005) (emphasis added) (citations omitted); *see also Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1208 (9th Cir. 1998) ("Arbitration is a creature of contract, a device of the parties rather than the judicial process.") (citation omitted); *Becker v. Davis*, 491 F.3d 1292, 1299 (11th Cir. 2007) ("[A]rbitration is a contractual right that is generally predicated on an express decision to waive the right to a trial in a judicial forum."); *Morrison v. Colo. Permanente Med. Group*, 983 F. Supp. 937, 944 (D. Colo. 1997) ("[C]ases and statutes discuss consistently the terms "arbitration" and "civil action" in a manner that leaves no doubt that arbitration is a creature separate from, and not just a form of, a civil action.").

[4] As a matter of parlance, reference, and common sense, we cannot conclude that when Congress used the

word "sue," it really meant "arbitrate." The district court correctly read the statute, and determined that the consumer's statutory right to sue could not be waived.

III

The Credit Providers raise a number of counter-theories, none of which is persuasive.

A

Credit Providers first argue that, by placing the "right to sue" in the mandatory "Disclosures" section of the statute, thus *requiring* it be explicitly stated to all consumers, does not actually create a right to sue as the terms are ordinarily understood. Under such a reading, Congress, whose purpose in enacting the statute included protecting consumers from misinformation, see 15 U.S.C. § 1679(b), drafted a statute which requires credit repair organizations to misinform consumers about a fictional right. Under Defendant's interpretation, Congress was requiring that consumers be told a lie: that they possessed a non-existent right. We should "avoid, if possible, a [statutory] interpretation that would produce 'an absurd and unjust result which Congress could not have intended.' " *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) (quoting *Clinton v. City of New York*, 524 U.S. 417, 429 (1998)). We do not believe Congress was playing Humpty Dumpty with the statute, and we decline to accept the Credit Providers' invitation to go down that particular rabbit hole.

B

The Credit Providers characterize the language stating "you have the right to sue" in Section 1679c as merely a simplified shorthand for the more "complicated" right to bring a claim under Section 1679g. This is actually a two-step argument. First, Credit Providers argue the "right to

sue" language should not be examined independently because it is merely a "simplified" restatement for consumers of the "substantive" rights embodied in the rest of the statute, particularly Section 1679g, which sets out the punishments available for violations of the Act. Second, Credit Providers argue the more general language of Section 1679g does not preclude arbitration.

We disagree. We must, if possible, interpret a statute such that all its language is given effect, and none of it is rendered superfluous. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Under Credit Providers' interpretation, the "right to sue" language, indeed, the entire "Disclosures" section, becomes superfluous and insignificant, merely a restatement of other sections of the statute that expand upon the rights set out in Section 1679c. We decline to adopt such a reading.

In addition, Credit Providers argue the language "right to sue" was used in the Section because it is more "understandable" to the average consumer than a broader phrase such as the "right to bring a claim." This is despite the fact that, according to Credit Providers, Congress meant to give consumers that latter right, rather than the former. If the purpose of the "Disclosures" was to communicate to consumers their right to sue or to proceed using some form of alternative dispute resolution, the phrase "right to sue" is a phrase particularly likely to cause confusion, and lead consumers to misunderst and their rights under the CROA. We see no reason to interpret the language in a way that goes against the purpose even Credit Providers have ascribed to it. The language actually chosen by Congress should be given effect because it is plain and clear on its face, and we "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (cit-

ing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

[5] The extremely broad anti-wavier provision in the CROA protects the enumerated "right to sue," by treating as void "[a]ny waiver by any consumer of any protection provided *by or any right of the consumer* under this subchapter . . . ." 15 U.S.C. § 1679f(a) (emphasis added). The Act further provides that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided or any right of the consumer under this subchapter shall be treated as a violation of this subchapter." 15 U.S.C. § 1679f(b). The plain language of the statute demonstrates that the waiver provision applies to the previously enumerated "right to sue." First, the use of the word "any" to describe which rights are covered is "expansive language [that] offers no indication whatever that Congress intended" to limit a statute's reach. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980). Thus, we read the term "any right of the consumer" to apply to all the rights in the statute, including the "right to sue." Second, Congress's consistent use of the word "right" indicates the waiver prohibition applies to the "right to sue," as identical words in a statute should be given a consistent and identical meaning throughout the statute. *See Powerex Corp v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). Therefore, we conclude that Congress meant what it said. Accordingly, the nonwaiver provision invalidates any waiver of the right to sue.

C

We are also not convinced by Credit Providers' argument regarding the language in 15 U.S.C. § 1679f(a). The section states a consumer waiver of any right or protection "may not be enforced by any Federal or State court or any other person." 15 U.S.C. § 1679f(a). Credit Providers argue the "any other person" language demon-

strates Congress intended arbitrators to be able to decide CROA claims. First, we do not think this language leads to such a clear and unilateral conclusion. For example, it is foreseeable that a credit repair organization would institute arbitration proceedings against a consumer for collection of the organization's fees under its contract with the consumer. The CROA creates various nonwaivable consumer rights and protections other than the right to sue. In an arbitration collection proceeding, one of the other non-waivable consumer rights or protections could arise. The "any other person" language of Section 1679f(a) assures that these rights and protections would be preserved in an arbitration instituted by a credit repair organization or debt collection agency. It is consistent with a consumer's explicitly stated non-waivable right to sue. Given the plain language creating such a right, we do not find this language requires a different conclusion.

In addition, the statutory language underscores the central role of courts in enforcement of the statute in § 1679g. This section, which sets out available damages for violations of the CROA, repeatedly refers only to "courts" as the enforcement mechanism. For example, punitive damages may be assessed in "such additional amount as *the court* may allow" and lays out factors that "*the court* shall consider." 15 U.S.C. § 1679g(a)(2)(A), (b) (emphasis added). Thus, the language in the remainder of the statute supports the plain reading of the text creating the right to sue, rather than requiring a different outcome.

[6] We agree with other courts that the "CROA's nonwaiver of rights provisions, combined with its proclamation of a consumer's right to sue, represent precisely the expression of congressional intent required by" the Supreme Court to find that a waiver of judicial remedies is precluded. *Alexander v. U.S. Credit Management, Inc.*, 384 F. Supp. 2d 1003, 1011 (N. D. Tex. 2005).

"Congress did not intend to void all waivers of rights under the Act, and require consumers to sign a congressionally mandated enumeration of their rights underthe Act, only to permit those very same rights to waived mere moments later upon the signing an agreement such as the one in question here." *Id.* at 1012. We agree with the district court that "[t]o recognize that CROA voids all waivers of 'any *right of the* consumer' and mandates that any waiver of the right to sue is void strikes the court as embracing an *unhealthy* regard for the federal policy favoring arbitration." Dkt. 64, at 8 (citation omitted). Thus, we hold the plain language of the CROA prohibits enforcement of the arbitration agreement.[4]

IV

We realize this decision is in conflict with that of two of our sister circuits, but we are unpersuaded by the reasoning of those cases. *See Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007); *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009). Both *Gay* and *Picard* give surprisingly little regard to the "right to sue" language in the statute, and rely upon reasoning in Supreme Court cases that are distinguishable from the situation here. As *Picard* essentially follows and adopts the reasoning in *Gay*, we will not deal with the two cases separately.

Gay dispatches with the explicit language creating a consumer's "right to sue" in a mere footnote. The court states that since the section does not specify the forum for resolution of the dispute, it does not support the argument that it provides a "judicial, rather than an arbitral, forum for CROA violations." *Gay*, 511 F.3d at 377 n.4. As

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[4] Having found a congressional intent to preclude the waiver of judicial remedies under the CROA in the text of the Act itself, there is no need for us to examine legislative history or any inherent tension between arbitration and the Act's underlying purpose.

discussed in more detail above, this ignores the plain meaning of the word "sue." The Third Circuit continues that even if "sue" implies the availability of a judicial forum (which we believe it does), use of the word "would not mean that the organization could not assert defenses that it had to such an action including the right to invoke a contractual arbitration provision to change the forum." *Id.* This ignores completely the anti-waiver clause of the statute. The anti-waiver clause explicitly states that any waiver of any right by the consumer "shall be treated as void" and "may not be enforced by any Federal or State court . . . ." 15 U.S.C. § 1679f(a)(1)-(2). Thus, the organization might assert the defense of the contractual arbitration provision, but the court is explicitly forbidden from enforcing this waiver of the right to sue.

Gay also relies upon analogies to several Supreme Court arbitration cases that we find unavailing. The Third Circuit first analogized the issue to the one the Supreme Court considered in *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), when it determined whether Section 29(a) of the Exchange Act prohibited arbitration agreements. Section 27 of the Act provides, "The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa. Section 29(a) of the Act declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]." *Id.* § 78cc(a). The plaintiffs in *McMahon* argued that Section 29(a) prohibited waiver of the Section 27 right to bring suit in a federal district court.

As pointed out by the court in *McMahon*, the Exchange Act's anti-waiver provision, § 29(a),

> forbids [ ] enforcement of agreements to waive "compliance" with the provisions of the statute. But § 27 itself does not impose any duty with which persons trading in securities must "comply." By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because § 27 does not impose any statutory duties, its waiver does not constitute a waiver of "compliance with any provision" of the Exchange Act under § 29(a).

McMahon, 482 U.S. at 228. In summary, because the Exchange Act only prohibits waivers of compliance with its substantive obligations and the mandate of a judicial forum is not a substantive obligation, the Exchange Act does not preclude arbitration agreements.

Applying *McMahon*, the Third Circuit observed that "the section [of the CROA] in which this anti-waiver provision appears is entitled 'Noncompliance with this subchapter.' " Gay, 511 F.3d at 385. The Third Circuit reasoned that the CROA's anti-waiver provision only "extend[s] to rights premised on the imposition of statutory duties." *Id.* Because the right to sue in a judicial forum is not a statutory duty under the CROA, the court concluded that the anti-waiver provision did not apply to it. *Id.* However, the plain text of 15 U.S.C. § 1679f encompasses waivers of "any protection" or "any right" under the CROA–categories which are much broader than mere noncompliance. "[H]eadings and titles are not meant to take the place of the detailed provisions of the text," and where the plain text of the statute is unambiguous, "the heading of a section cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R., Co.*, 331 U.S. 519, 528-29 (1947); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, it is of use only when it sheds light on some

ambiguous word or phrase."). Here, because the text of § 1679f(a) is not ambiguous, we need not turn to the title of the section to clarify its meaning. Further, the substantive-procedural distinction has no application to the CROA. Unlike the Exchange Act, the CROA grants consumers the "right to sue." Vesting jurisdiction to hear a claim in a particular court is quantitatively different from a statute that expressly provides for a right to sue. Thus, § 1679f's prohibition on waivers may not be limited to "compliance" with the CROA, and *McMahon* does not apply.[5]

We are also not persuaded that the other Supreme Court cases regarding the availability of arbitration require allowing arbitration in this case. For instance, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Supreme Court considered whether the language in 15 U.S.C. § 15(a) rendered antitrust claims non-arbitrable in the context of an international commercial dispute. In relevant part, § 15(a) provides that "any person who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue therefor in any district court

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[5]The Third Circuit also relies upon the Supreme Court's reasoning in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481-83 (1989), which held that the Securities Act of 1933 does not preclude arbitration. *Gay*, 511 U.S. at 385. *Rodriguez de Quijas* considered jurisdictional and non-waiver language virtually identical to the language considered in *McMahon*. The main difference between the two is that the Securities Act allows for concurrent jurisdiction in state and federal courts whereas the Exchange Act provides for exclusive federal jurisdiction. *Rodriguez de Quijas*, 490 U.S. at 481-83. The court relied on the same distinction between procedural and substantive provisions and held that waiving the jurisdictional provision does not fall under the prohibition against waiving "compliance" with the Act. *Id.* We find this reasoning unpersuasive here for the same reasons discussed in regards to *McMahon*.

of the United States." The Court held that this section "did not evidence a congressional intent to preclude Sherman Act claims from being arbitrable, emphasizing that the Federal Arbitration Act and the Convention on the Recognition of Enforcement of Foreign Arbitral Awards favor arbitration for disputes in international commerce. The Court concluded that it was important "to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." *Mitsubishi*, 473 U.S. at 639. The present case differs in that it does not contain an international component. More importantly, the CROA contains express language which precludes waiving "any right of the consumer." 15 U.S.C. § 1679f(a). A plain reading of the statute dictates that one of those rights is the "right to sue a credit repair organization that violates" the CROA. *Id.* § 1679c. The Sherman Act does not contain similar non-waiver language, and thus does not apply to this situation.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991), the Supreme Court considered whether an arbitration agreement in a securities registration application could be avoided on the theory that arbitration "deprives claimants of the judicial forum provided for by the [Age Discrimination in Employment Act (ADEA)]." The ADEA contains the following non-waiver provision: "any individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." However, the ADEA does not explicitly provide for a "right to sue." Rather, the ADEA takes a "flexible approach to resolution of claims. The EEOC for example, is directed to pursue 'informal methods of conciliation, conference, and persuasion,' 29 U.S.C. § 626(b), which suggests that an out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress." *Gilmer*, 500 U.S. at 29.

Contrary to the ADEA, the CROA specifically grants access to a judicial forum and a right to sue, and reveals no such "flexibility" toward alternative methods of dispute resolution. Moreover, in contrast to language in the ADEA that permits "knowing and voluntary" waiver of statutory rights, the CROA proscribes any "waiver by any consumer of any protection provided by or any right of the consumer under this title" irrespective of a consumer's knowledge or intent. 15 U.S.C. § 1679f(a). Thus, *Gilmer* is also inapplicable here.

Finally, in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 80 (2000), the Supreme Court considered whether claims under the Truth in Lending Act (TILA) were arbitrable. The party challenging arbitration did not "contend that the TILA evinces an intention to preclude a waiver of judicial remedies." *Id.* Instead, plaintiffs challenged arbitration because the costs and fees would be prohibitive. Id. The Court, finding no showing regarding prohibitive costs was made, rejected the argument. Here, arbitration is challenged on the ground that the CROA evinces an intention to preclude a waiver of judicial remedies. *Green Tree* simply does not apply.

V

[7] The CROA gives consumers the "right to sue," and prevents any waiver of "any right" under the statute. We find this sufficient to demonstrate Congress intended that consumers cannot waive their right to sue under the CROA, and instead submit to arbitration. Therefore, we affirm the district court's holding that the forced arbitration clause is void and the court's denial of the motion to compel arbitration of the CROA claims.

AFFIRMED.

TASHIMA, Circuit Judge, dissenting:

Because I disagree with the majority's conclusion that Congress intended to preclude a waiver of a judicial forum for claims under the Credit Repair Organizations Act ("CROA"), I respectfully dissent.

As the majority acknowledges, Congress has manifested "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Under the Federal Arbitration Act, courts should enforce arbitration agreements involving statutory claims " 'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)). Congress' intent to preclude a waiver of judicial remedies must be shown by the statute's text, its legislative history, or an inherent conflict between arbitration and the statute's underlying purpose. *Id.* Plaintiffs bear the burden of showing that Congress intended to preclude a waiver of a judicial forum for CROA claims. *See Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987) ("The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.").

The majority concludes that the plain language of 15 U.S.C. § 1679c(a) provides consumers with the "right to sue," that the right to sue implies a judicial forum, and that 15 U.S.C. § 1679f prohibits any waiver of this right. (Maj. Op. at 12080.) I submit, however, that the plain language of § 1679c(a) does not confer this right upon consumers, and neither the CROA nor its legislative history shows that Congress intended to preclude a waiver of judicial remedies.

All that § 1679c(a) requires is that a credit repair organization provide consumers with the following written disclosure:

> You have a right to dispute inaccurate information in your credit report . . . .
>
> You have a right to obtain a copy of your credit report . . . .
>
> You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.
>
> You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it . . . .

15 U.S.C. § 1679c(a). This section does not purport to create any substantive rights, including the right to sue. Rather, its sole purpose is to set forth a disclosure statement to be communicated verbatim to consumers.

Each of the rights referred to in § 1679c(a) is separately conferred within Chapter 41 of Title 15, thus indicating that Congress included § 1679c(a) to advise consumers of relevant rights provided for *elsewhere* in the CROA. *See Rex v. CSACredit Solutions of America, Inc.*, 507 F. Supp. 2d 788, 798- 99 (W.D. Mich. 2007) ("The inclusion of separate sections actually providing the substantive rights indicates that the language in the disclosures in § 1679c does not create any rights. Rather, the language in § 1679c only sets forth the phrasing that is to be used in advising consumers of their rights under other sections of Chapter 41 of Title 15."). For example, 15 U.S.C. § 1681i provides a consumer with the right to dispute inaccurate information in his credit report, 15 U.S.C. § 1681j provides a consumer with the right to obtain a copy of his credit

report, and 15 U.S.C. § 1679e(a) provides a consumer with the right to cancel a contract with a credit repair organization within three business days. *See Rex*, 507 F. Supp. at 799 n.5.

The "right to sue" listed in § 1679c(a) is provided for in 15 U.S.C. § 1679g, which establishes civil liability for violations of the CROA. Because § 1679g provides for civil liability, a consumer ordinarily has the "right to sue" a credit repair organization which violates the CROA. Nowhere in the CROA, however, does Congress mandate a judicial forum for enforcement of the CROA's substantive provisions. The disclosure language in § 1679c(a), while recognizing a right to sue, does not itself confer that right. *See Gay v. CreditInform*, 511 F.3d 369, 381-82 (3d Cir. 2007) ("Although the statutes clearly contemplate consumers' actions being brought in a judicial forum . . . and to that extent may be said to recognize a consumer's right to proceed in court, they neither contain provisions creating such rights nor indicate that Congress . . . intended to exclude claims asserted under the CROA . . . from arbitration agreements."). Because § 1679c(a) does not establish any rights, but only requires credit repair organizations to make a written disclosure to consumers, the disclosure statement's mention of a "right to sue" cannot be the basis of a non-waivable right under 15 U.S.C. § 1679f.

In addition, 15 U.S.C. § 1679f indicates that Congress intended that CROA claims to be enforceable outside a judicial forum. It provides that "[a]ny waiver . . . of any protection . . . or any right . . . under this subchapter . . . may not be enforced by any Federal or State court *or any other person*." 15 U.S.C. § 1679f(a) (emphasis added). By including "or any other person" in the same sentence that lists Federal and State courts as appropriate fora for CROA claims, Congress clearly indicated that arbitrators, mediators, and other third parties may decide CROA

claims. This language indicates that Congress contemplated a role for arbitrators in enforcing CROA claims. On the other hand, the majority's suggestion that the references to "the court" in § 1679g support a right to sue in court, does not overcome the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Such language merely indicates Congress' expectation that the question of civil liability will normally be resolved in a judicial forum. It does not confer a non-waivable right to a judicial forum.

Finally, the mere mention of a "right to sue" does not necessarily mean the right to sue *in court*, especially given the lack of other statutory language supporting this interpretation. The only other circuits to have ruled on this issue are in agreement. *See Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1255 (11th Cir. 2009) ("Although CROA requires credit repair organizations to inform consumers of their right to a private cause of action, such does not preclude arbitration under CROA"); *Gay*, 511 F.3d at 377 n.4 ("[15 U.S.C. § 1679c(a)] does not specify the forum for the resolution of the dispute and therefore does not support [the] argument that the CROA provides a consumer with the right to bring suit in a judicial, rather than an arbitral, forum for CROA violations."). We should not lightly create a circuit split on an issue of national application on the basis of the flimsy evidence on which the majority relies. *See Maniar v. Fed. Deposit Ins. Corp.*, 979 F.2d 782, 785 (9th Cir. 1992) ("[U]niformity among the circuits in matters having general application to the various states is preferable as long as individual justice is not sacrificed."). We should be "hesitant to create such a split, and we should do so only after the most painstaking inquiry" and only if required by the "unambiguously expressed intent of Congress." *Zimmerman v. Dep't of Justice*, 170 F.3d 1169, 1183-84 (9th Cir. 1999).

The majority does not even address whether the legislative history of the CROA or any inherent conflict between arbitration and the statute's underlying purpose may form a basis for prohibiting waiver of the judicial forum. Nothing cited by Plaintiffs suggests that Congress actually considered the issue of arbitrability of CROA claims, and the legislative history does not establish that Congress intended CROA claims to be non-arbitrable. *See Rex*, 507 F. Supp. 2d at 800 ("In the absence of any discussion of arbitration in the legislative history, the legislative history cannot provide a basis for the Court to conclude that Congress intended claims under the CROA to be nonarbitrable."). In addition, there is no inherent conflict between arbitration and CROA's underlying purpose because Plaintiffs may enforce their rights under the substantive provisions of CROA even if compelled to arbitrate. *See Mitsubishi Motors Corp.*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

Because neither the plain text of the statute, its legislative history, nor any inherent conflict between the purpose of CROA and arbitration shows that Congress intended to preclude a waiver of judicial remedies, I would reverse the district court's order and remand with instructions to compel arbitration.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WANDA GREENWOOD LADELLE HATFIELD;
DEBORAH MCCLEESE, on behalf of themselves
and other similarly situated,

Plaintiffs,

v.

COMPUCREDIT CORPORATION and OPINION
COLUMBUS BANK AND TRUST,
jointly and individually,

Defendants.

No. C 08-04878 CW
ORDER DENYING DEFENDANTS' MOTION
TO COMPEL ARBITRATION

Defendants Compucredit Corporation and Columbus Bank and Trust move to compel Plaintiffs Wanda Greenwood, Ladelle Hatfield and Deborah McCleese to arbitrate their claims brought pursuant to the Credit Repair Organization Act (CROA). Plaintiffs oppose the motion. The motion was heard on February 26, 2009. Having considered all of the parties' papers and oral argument on the motion, the Court denies Defendants' motion. The Court concludes that CROA prohibits consumers from waiving their right to sue.

BACKGROUND

The following facts are alleged in the complaint. Defendant Compucredit marketed a subprime credit card under the brand name Aspire Visa to consumers with low

or weak credit scores through massive direct-mail solicitations and the internet. Compucredit is the exclusive marketer and advertiser of Aspire Visa credit cards and the credit cards are issued by Columbus Bank and Trust. Compucredit marketed the card by representing to consumers that an Aspire Visa credit card could be used by the consumer to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." The promotional materials also noted that there was "no deposit required," and that consumers would immediately receive $300 in available credit when they received their credit card. However, once Columbus Bank and Trust issued the credit card, consumers were charged a $29 finance charge, a monthly $6.50 account maintenance fee and a $150 annual fee. These fees were immediately assessed against the $300 credit limit before the consumer received the credit card. Although Compucredit's promotional materials mentioned these fees, it did so in small print, buried in other information in the advertisement, and not in proximity to its representations that no deposit was required. Plaintiffs allege that Defendants' actions constitute several violations of the CROA and of California's Unfair Competition Law.

Before receiving an Aspire Visa credit card, each Plaintiff received a mailing entitled, Pre-Approved Acceptance Certificate. The Acceptance Certificate includes the following paragraph:

> By signing, I request an Aspire Visa card and ask that an account be opened for me. I certify that everything I have stated in the Acceptance Certificate is true and accurate to the best of my knowledge. I have read and agree to be bound by the "Summary of Credit Terms" and "Terms of Offer" printed on the enclosed insert, *which insert includes a discussion of arbitration applicable to my account*, and is incorporated here by reference.

(emphasis in original). Plaintiffs signed the Acceptance Certificate. The "Terms of the Offer" states, in very small bold print in all capitals,

> **IMPORTANT — THE AGREEMENT YOU RECEIVE CONTAINS A BINDING ARBITRATION PROVISION. IF A DISPUTE IS RESOLVED BY BINDING ARBITRATION, YOU WILL NOT HAVE THE RIGHT TO GO TOCOURT OR HAVE THE DISPUTE HEARD BY A JURY, TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PERMITTED UNDER THE CODE OF PROCEDURE OF THE NATIONAL ARBITRATION FORUM ("NAF"), OR TO PARTICIPATE AS PART OF A CLASS OF CLAIMANTS RELATING TO SUCH DISPUTE. OTHER RIGHTS AVAILABLE TO YOU IN COURT MAY BE UNAVAILABLE IN ARBITRATION.**

In even smaller print, the "Summary of Credit Terms" contains the following:

> ARBITRATION PROVISION (AGREEMENT TO ARBITRATE CLAIMS)
>
> Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, will be resolved by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure ("NAF Rules") of the National Arbitration Forum ("NAF") in effect when the Claim is filed. If for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure.
>
> Upon such an election, neither you nor we will

> have the right to litigate in court the claim being arbitrated, including a jury trial, or to engage in pre-arbitration discovery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or member of any class of claimants relating to any claim subject to arbitration. Except as set forth below, the arbitrator's decision will be final and binding. Other rights available to you in court might not be available in arbitration.

The agreement also provides, "This Agreement, and your Account, and any claim, dispute or controversy (whether in contract, tort or otherwise) . . . are governed by and construed in accordance with applicable federal law and the laws of Georgia.[1]

LEGAL STANDARD

I. Motion to Compel Arbitration

Under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, written agreements that controversies between the parties shall be settled by arbitration are valid, irrevocable, and enforceable. 9 U.S.C. § 2. A party aggrieved by the refusal of another to arbitrate under a written arbitration agreement may petition the district court which would, save for the arbitration agreement, have jurisdiction over that action, for an order directing that arbitration proceed as provided for in the agreement. 9 U.S.C. § 4. The FAA further provides that:

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[1] The Court takes judicial notice of Compucredit's most recent annual registration with the Georgia Secretary of State and its most recent notice of annual meeting of shareholders, although not of the truth of the facts stated therein. *See Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (court may take judicial notice of facts not reasonably subject to dispute, either because they are generally known, are matters of public record or are capable of accurate and ready determination).

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . .

9 U.S.C. § 3.

If the court is satisfied "that the making of the arbitration agreement or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* The FAA reflects a "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). A district court must compel arbitration under the FAA if it determines that: 1) there exists a valid agreement to arbitrate; and 2) the dispute falls within its terms. *Stern v. Cingular Wireless Corp.*, 453 F. Supp. 2d 1138, 1143 (C.D. Cal. 2006) (citing *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000)).

DISCUSSION

I. Motion to Compel Arbitration

Plaintiffs argue that the Court should not compel arbitration because the arbitration agreement is void under the CROA as to the national class, and it is void and unconscionable under California law as to the California class. Defendants clarify in their reply brief that they move to compel arbitration of the CROA claims as to the

national class only, not of the claims pursued by the California class under California law. Therefore, the Court need not address whether the arbitration provision is void and unconscionable under California law.

Plaintiffs argue that the arbitration agreement is void as to the national class because the CROA contains specific provisions disallowing any waiver of a consumer's right to sue in court for CROA violations.[2] Each credit repair organization is required to (1) inform the consumer of his or her right to sue, (2) provide such information to the consumer in a separate document containing a verbatim copy of an eight-paragraph text specified by Congress, which enumerates the "right to sue," (3) obtain from the consumer a signature confirming receipt of such information and (4) keep such signed confirmations on file for two years from the date of signing. 15 U.S.C. § 1679c(a)-(c). The written disclosure specifically states that consumers "have a *right to sue* a credit repair organization that violates the Credit Repair Organization Act." 15 U.S.C. § 1679c (emphasis added). This disclosure document must be provided to every consumer "before any contract or agreement between the consumer and the credit repair organization is executed." *Id.* § 1679c(a). The CROA contains a non-waiver provision, which states:

> Any waiver by any consumer of any protection provided by or *any right of the consumer* under this

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[2] Defendants do not dispute that they are a "credit repair organization" as defined by 15 U.S.C. § 1679a(3)(A). That section provides, The term "credit repair organization" (A) means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of (i) improving any consumer's credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i).

> subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.

15 U.S.C. § 1679f(a) (emphasis added). Based on these sections, Plaintiffs argue that they have a right to sue under CROA that cannot be waived. The issue of arbitration under CROA appears to be one of first impression in the Ninth Circuit.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 624, 628 (1985), the Supreme Court held, "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." The Court continued, "If Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history." *Id.* The party seeking to avoid arbitration of a statutory claim has the burden of establishing Congressional intent to preclude arbitration of the claim. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

Only a few courts around the country have confronted this issue. A district court in Texas concluded that "CROA's non-waiver of rights provisions, combined with its proclamation of a consumer's right to sue, represent precisely the expression of congressional intent required by" the Supreme Court to find that a waiver of judicial remedies is precluded. *Alexander v. U.S. Credit Management, Inc.*, 384 F. Supp. 2d 1003, 1011 (N.D. Tx. 2005). That court also stated that "Congress did not intend to void all waivers of rights under the Act, and require consumers to sign a congressionally mandated enumeration of their rights under the Act, only to permit those very same rights to be waived mere moments later upon the

signing an agreement such as the one in question here." *Id.* at 1012. A district court in Alabama recently noted, "The striking congruence of the language used in the disclosure provision, § 1679c, and the non-waiver provision, § 1679f, convinces the court that Congress intended to create a right to go to court under CROA that cannot be waived." *Reynolds v. Credit Solutions, Inc.*, 541 F. Supp. 2d 1248, 1258 (N.D. Ala. 2008). That court continued, "To recognize that CROA voids all waivers of 'any right of the consumer' and mandates that any waiver of the right to sue is void strikes the court as embracing an unhealthy regard for the federal policy favoring arbitration." *Id.* (emphasis in original).

However, a district court in Michigan noted that "besides entitling consumers to the actual disclosure statement, § 1679c does not afford consumers any rights or protections." *Rex v. CSA-Credit Solutions of America, Inc.*, 507 F. Supp. 2d 788, 798 (W.D. Mich. 2007). The court concluded that a different section of the statute, § 1679g(a), provides consumers with the actual right to bring a claim, and that section "does not contain any language indicating that claims under the CROA are nonarbitrable." *Id.* at 799.

The Third Circuit addressed this issue and similarly held that CROA's "anti-waiver provision as a matter of legislative intent would not apply to a right to assert claims in a judicial forum or on a class action basis, and a consumer asserting claims pursuant to the CROA may therefore waive such rights." *Gay v. Creditinform*, 511 F.3d 369, 383 (3d Cir. 2007).

The Third Circuit analogized the issue to one that the Supreme Court considered in *Shearson/Am. Express, Inc. v. McMahon* when it determined whether section 29(a) of the Exchange Act prohibited arbitration agreements. Section 27 of the Act provides, "The district courts

of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa. And section 29(a) of the Act declares void "any condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act]." *Id.* § 78cc(a). The plaintiffs in *McMahon* argued that section 29(a) prohibited waiver of the section 27 right to bring suit in a federal district court.

The Third Circuit took particular note of the following analysis in *McMahon:* "What the anti-waiver provision of § 29 forbids is enforcement of agreements to waive 'compliance' with the provisions of the statute," and "§ 27 itself does not impose any duty with which persons trading in securities must 'comply.'" *McMahon*, 482 U.S. at 228. The Supreme Court distinguished between the procedural right that section 27 provides, the right to file an action in a federal district court, and the substantive rights that section 29(a) provides. The Court continued, "By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act," and "[b]ecause § 27 does not impose any statutory duties, its waiver does not constitute a waiver of 'compliance with any provision' of the Exchange Act under § 29(a)." *Id.*

Applying *McMahon*, the Third Circuit observed that "the section [of the CROA] in which this anti-waiver provision appears is entitled 'Noncompliance with this subchapter.'" *Gay*, 511 F.3d at 385. The Third Circuit reasoned that CROA's anti-waiver provision only "extend[s] to rights premised on the imposition of statutory duties." *Id.* Because the right to sue in a judicial forum is not a statutory duty under the CROA, the court concluded that the antiwaiver provision did not apply to it. *Id.*

The Court finds the reasoning of *Alexander* and *Reynolds* more persuasive than that in *Rex* and *Gay*. In making this decision, the Court is mindful that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26. The Court also notes that the Supreme Court has regularly concluded that statutory claims in a variety of contexts are arbitrable. *See, e.g.*, *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 88-92 (2000) (Truth in Lending Act); Gilmer, 500 U.S. at 35 (Age Discrimination in Employment Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479-86 (1989) (Securities Act of 1933); *McMahon*, 482 U.S. at 227-40 (Securities Exchange Act of 1934, Racketeer Influenced and Corrupt Organization Act); *Mitsubishi Motors*, 473 U.S. at 628-40 (Sherman Anti-Trust Act).

However, the "right to sue" and non-waiver language used in CROA is different in important respects from other statutory language that the Supreme Court found not to preclude a waiver of judicial remedies. For instance, in *Mitsubishi Motors*, the Court considered whether language in 15 U.S.C. § 15(a) rendered antitrust claims non-arbitrable. In relevant part, § 15(a) provides that "any person who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue therefor in any district court of the United States." The Court held that this section did not evidence a congressional intent to preclude Sherman Act claims from being arbitrable. Further, the Court noted that the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards favor arbitration for disputes in international commerce. The Court concluded that it was important "to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." *Mitsubishi*, 473 U.S. at 639. The present case differs from *Mitsubishi* in

that it does not contain an international component. Further, CROA contains express language which precludes waiving "any right of the consumer." 15 U.S.C. § 1679f(a). A plain reading of the statute dictates that one of those rights is the "right to sue a credit repair organization that violates" CROA. *Id.* § 1679c. The Sherman Act does not contain similar non-waiver language.

In *Rodriguez de Quijas*, the Court held that the Securities Act of 1933 does not preclude arbitration. 490 U.S. 481-83. There, the Court considered jurisdictional and non-waiver language virtually identical to the language considered in *McMahon*. The main difference between the two is that the Securities Act allows for concurrent jurisdiction in state and federal courts whereas the Exchange Act provides for exclusive federal jurisdiction. *Id.* The Court relied on the same distinction between procedural and substantive provisions and held that waiving the jurisdictional provision does not fall under the prohibition against waiving "compliance" with the Act. *Id.*

Again, the non-waiver provision in CROA differs from the nonwaiver provisions at issue in *McMahon* and *Rodriguez*. CROA's nonwaiver provision is not limited to the waiver of compliance with the Act. Though the section of the CROA in which the non-waiver provision appears is entitled "Noncompliance with this subchapter," the following text of the statute specifically voids the waiver of any rights of the consumer. 15 U.S.C. § 1679f(a). The Supreme Court has noted that "the title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, it is of use only when it sheds light of some ambiguous word or phrase." *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). Here, because the text of § 1679f(a) is not ambiguous, the Court need not turn to the title of section to clarify its meaning.

Further, the substantive–procedural distinction has no application to CROA. Unlike the Exchange Act and the Securities Act, CROA grants consumers the "right to sue." Vesting jurisdiction to hear a claim in a particular court is qualitatively different from a statute that expressly provides for a right to sue.

In *Gilmer*, the Court considered whether an arbitration agreement in a securities registration application could be avoided on the theory that arbitration "deprives claimants of the judicial forum provided for by the [Age Discrimination in Employment Act (ADEA)]." 500 U.S. at 29. The ADEA contains the following nonwaiver provision: "any individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." However, the ADEA does not explicitly provide for a "right to sue." Rather, the ADEA takes a "flexible approach to resolution of claims. The EEOC, for example, is directed to pursue 'informal methods of conciliation, conference, and persuasion,' 29 U.S.C. § 626(b), which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress." *Gilmer*, 500 U.S. at 29.

Contrary to the ADEA, CROA specifically grants access to a judicial forum as a right and reveals no such "flexibility" toward alternative methods of dispute resolution. Moreover, in contrast to language in the ADEA that permits "knowing and voluntary" waiver of statutory rights, CROA proscribes any "waiver by any consumer of any protection provided by or any right of the consumer under this title" irrespective of a consumer's knowledge or intent. 15 U.S.C. § 1679f(a).

In *Green Tree*, the Supreme Court considered whether claims under the Truth in Lending Act (TILA) were arbitrable. The party challenging arbitration did not "contend that the TILA evinces an intention to preclude a waiver of

judicial remedies." 531 U.S. at 90. Instead, arbitration was challenged because the costs and fees would be prohibitive. *Id.* The Court held that the party seeking to avoid arbitration on such grounds "bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. The Court concluded that "neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point." *Id.* Therefore, the Court rejected the argument that prohibitive costs made it impossible to vindicate statutory rights in arbitration. *Id.* Unlike *Green Tree*, in the present case, arbitration is directly challenged on the ground that CROA evinces an intention to preclude a waiver of judicial remedies.

In sum, the Court concludes that Congress intended claims under the CROA to be non-arbitrable. Requiring a dispute to be resolved through arbitration is incompatible with CROA's non-waivable right to sue. Therefore, the Court finds that the arbitration clause is void.[3]

CONCLUSION

For the foregoing reasons, the Court denies Defendants' motion to compel arbitration of Plaintiffs' CROA claims as they pertain to the national class (Docket Nos. 17 and 27).

IT IS SO ORDERED.

Dated: 4/1/09

CLAUDIA WILKEN
United States District Judge

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[3] To the extent the Court relied upon evidence to which Defendants objected, the objections are overruled. To the extent the Court did not rely on such evidence, Defendants' objections are overruled as moot.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WANDA GREENWOOD; *et al.*,

Plaintiffs - Appellees,

v.

COMPUCREDIT CORPORATION AND COLUMBUS BANK AND TRUST, jointly and individually,

Defendants - Appellants.

No. 09-15906
D.C. No. 4:08-cv-04878-CW
Northern District of California, Oakland

ORDER

Before: KLEINFELD, TASHIMA and THOMAS, Circuit Judges.

Judges Kleinfeld and Thomas have voted to deny the appellants' petition for rehearing. Judge Tashima has voted to grant the appellants' petition for rehearing. Judge Thomas has voted to deny the appellants' petition for rehearing en banc and Judge Kleinfeld has so recommended. Judge Tashima has recommended that the appellants' petition for rehearing en banc be granted.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are rejected.

APPENDIX D

RELEVANT STATUTE

SUBCHAPTER II–A— CREDIT REPAIR ORGANIZATIONS

§ 1679. Findings and purposes

(a) Findings

The Congress makes the following findings:

(1) Consumers have a vital interest in establishing and maintaining their credit worthiness[1] and credit standing in order to obtain and use credit. As a result, consumers who have experienced credit problems may seek assistance from credit repair organizations which offer to improve the credit standing of such consumers.

(2) Certain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters.

(b) Purposes

The purposes of this subchapter are—

(1) to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services; and

(2) to protect the public from unfair or deceptive advertising and business practices by credit repair organizations.

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[1] So in original. Probably should be "creditworthiness,".

(Pub. L. 90–321, title IV, § 402, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–455.)

PRIOR PROVISIONS

A prior title IV of Pub. L. 90–321, May 29, 1968, 82 Stat. 164, as amended by Pub. L. 91–344, July 20, 1970, 84 Stat. 440; Pub. L. 92–321, June 30, 1972, 86 Stat. 382, which was set out as a note under section 1601 of this title, established a bipartisan National Commission on Consumer Finance to study the functioning and structure of the consumer finance industry as well as consumer credit transactions generally. The Commission was to submit a final report by Dec. 31, 1972, and was to cease to exist thereafter.

EFFECTIVE DATE OF SUBCHAPTER

Section 413 of title IV of Pub. L. 90–321, as added by Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–462, provided that: "This title [enacting this subchapter] shall apply after the end of the 6-month period beginning on the date of the enactment of the Credit Repair Organizations Act [Sept. 30, 1996], except with respect to contracts entered into by a credit repair organization before the end of such period."

§ 1679a. Definitions

For purposes of this subchapter, the following definitions apply:

(1) Consumer

The term "consumer" means an individual.

(2) Consumer credit transaction

The term "consumer credit transaction" means any transaction in which credit is offered or extended to an individual for personal, family, or household purposes.

(3) Credit repair organization

The term "credit repair organization"—

(A) means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of—

(i) improving any consumer's credit record, credit history, or credit rating; or

(ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i); and

(B) does not include—

(i) any nonprofit organization which is exempt from taxation under section 501(c)(3) of title 26;

(ii) any creditor (as defined in section 1602 of this title), with respect to any consumer, to the extent the creditor is assisting the consumer to restructure any debt owed by the consumer to the creditor; or

(iii) any depository institution (as that term is defined in section 1813 of title 12) or any Federal or State credit union (as those terms are defined in section 1752 of title 12), or any affiliate or subsidiary of such a depository institution or credit union.

(4) Credit

The term "credit" has the meaning given to such term in section 1602(e) of this title.

(Pub. L. 90–321, title IV, § 403, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–455.)

PRIOR PROVISIONS

For a prior section 403 of Pub. L. 90–321, see note set out under section 1679 of this title.

§ 1679b. Prohibited practices

(a) In general

No person may—

(1) make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading (or which, upon the exercise of reasonable care, should be known by the credit repair organization, officer, employee, agent, or other person to be untrue or misleading) with respect to any consumer's credit worthiness,1 credit standing, or credit capacity to—

(A) any consumer reporting agency (as defined in section 1681a(f) of this title); or

(B) any person—

(i) who has extended credit to the consumer; or

(ii) to whom the consumer has applied or is applying for an extension of credit;

(2) make any statement, or counsel or advise any consumer to make any statement, the intended effect of which is to alter the consumer's identification to prevent the display of the consumer's credit record, history, or rating for the purpose of concealing adverse information that is accurate and not obsolete to—

(A) any consumer reporting agency;

(B) any person—

(i) who has extended credit to the consumer; or

(ii) to whom the consumer has applied or is applying for an extension of credit;

(3) make or use any untrue or misleading representation of the services of the credit repair organization; or

(4) engage, directly or indirectly, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of the credit repair organization.

(b) Payment in advance

No credit repair organization may charge or receive any money or other valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before such service is fully performed.

(Pub. L. 90–321, title IV, § 404, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–456.)

PRIOR PROVISIONS

For a prior section 404 of Pub. L. 90–321, see note set out under section 1679 of this title.

§ 1679c. Disclosures

(a) Disclosure required

Any credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed:

"Consumer Credit File Rights Under State and Federal Law

"You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly. However, neither you nor any 'credit repair' company or credit repair organization has the right to have accurate, current, and verifiable information removed from your credit report. The credit bureau must remove accurate, negative information from your report only if it is over 7 years old. Bankruptcy information can be reported for 10 years.

"You have a right to obtain a copy of your credit report from a credit bureau. You may be charged a reasonable fee. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The credit bureau must provide someone to help you interpret the information in your credit file. You are entitled to receive a free copy of your credit report if you are unemployed and intend to apply for employment in the next 60 days, if you are a recipient of public welfare assistance, or if you have reason to believe that there is inaccurate information in your credit report due to fraud.

"You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.

"You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it.

"Credit bureaus are required to follow reasonable procedures to ensure that the information they report is accurate. However, mistakes may occur.

"You may, on your own, notify a credit bureau in writing that you dispute the accuracy of information in your credit file. The credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. The credit bureau may not charge any fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the credit bureau.

"If the credit bureau's reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the credit bureau, to be kept in your file, explaining why you think the record is inaccurate. The credit bureau must include a summary of your statement about disputed information with any report it issues about you.

"The Federal Trade Commission regulates credit bureaus and credit repair organizations. For more information contact:

"The Public Reference Branch
"Federal Trade Commission
"Washington, D.C. 20580".

(b) Separate statement requirement

The written statement required under this section shall be provided as a document which is separate from any written contract or other agreement between the credit repair organization and the consumer or any other written material provided to the consumer.

(c) Retention of compliance records

(1) In general

The credit repair organization shall maintain a copy of the statement signed by the consumer acknowledging receipt of the statement.

(2) Maintenance for 2 years

The copy of any consumer's statement shall be maintained in the organization's files for 2 years after the date on which the statement is signed by the consumer.

(Pub. L. 90–321, title IV, § 405, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–457.)

REFERENCES IN TEXT

The Credit Repair Organization Act, referred to in subsec. (a), probably means the Credit Repair Organizations Act, Pub. L. 90–321, title IV, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–454, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of this title and Tables.

PRIOR PROVISIONS

For a prior section 405 of Pub. L. 90–321, see note set out under section 1679 of this title.

§ 1679d. Credit repair organizations contracts

(a) Written contracts required

No services may be provided by any credit repair organization for any consumer—

(1) unless a written and dated contract (for the purchase of such services) which meets the requirements of subsection (b) of this section has been signed by the consumer; or

(2) before the end of the 3-business-day period beginning on the date the contract is signed.

(b) Terms and conditions of contract

No contract referred to in subsection (a) of this section

meets the requirements of this subsection unless such contract includes (in writing)—

(1) the terms and conditions of payment, including the total amount of all payments to be made by the consumer to the credit repair organization or to any other person;

(2) a full and detailed description of the services to be performed by the credit repair organization for the consumer, including—

(A) all guarantees of performance; and

(B) an estimate of—

(i) the date by which the performance of the services (to be performed by the credit repair organization or any other person) will be complete; or

(ii) the length of the period necessary to perform such services;

(3) the credit repair organization's name and principal business address; and

(4) a conspicuous statement in bold face type, in immediate proximity to the space reserved for the consumer's signature on the contract, which reads as follows: "You may cancel this contract without penalty or obligation at any time before midnight of the 3rd business day after the date on which you signed the contract. See the attached notice of cancellation form for an explanation of this right.".

(Pub. L. 90–321, title IV, § 406, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–458.)

PRIOR PROVISIONS

For a prior section 406 of Pub. L. 90–321, see note set out under section 1679 of this title.

§ 1679e. Right to cancel contract

(a) In general

Any consumer may cancel any contract with any credit repair organization without penalty or obligation by notifying the credit repair organization of the consumer's intention to do so at any time before midnight of the 3rd business day which begins after the date on which the contract or agreement between the consumer and the credit repair organization is executed or would, but for this subsection, become enforceable against the parties.

(b) Cancellation form and other information

Each contract shall be accompanied by a form, in duplicate, which has the heading "Notice of Cancellation" and contains in bold face type the following statement:

'You may cancel this contract, without any penalty or obligation, at any time before midnight of the 3rd day which begins after the date the contract is signed by you.

"To cancel this contract, mail or deliver a signed, dated copy of this cancellation notice, or any other written notice to [name of credit repair organization] at [address of credit repair organization] before midnight on [date]

"I hereby cancel this transaction,

[date]

[purchaser's signature].".

(c) Consumer copy of contract required

Any consumer who enters into any contract with any credit repair organization shall be given, by the organization—

(1) a copy of the completed contract and the disclosure statement required under section 1679c of this title; and

(2) a copy of any other document the credit repair organization requires the consumer to sign, at the time the contract or the other document is signed.

(Pub. L. 90–321, title IV, § 407, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–459.)

PRIOR PROVISIONS

For a prior section 407 of Pub. L. 90–321, see note set out under section 1679 of this title.

§ 1679f. Noncompliance with this subchapter

(a) Consumer waivers invalid

Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.

(b) Attempt to obtain waiver

Any attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter shall be treated as a violation of this subchapter.

(c) Contracts not in compliance

Any contract for services which does not comply with the applicable provisions of this subchapter—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.

(Pub. L. 90–321, title IV, § 408, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–459.)

§ 1679g. Civil liability

(a) Liability established

Any person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person in an amount equal to the sum of the amounts determined under each of the following paragraphs:

(1) Actual damages

The greater of—

(A) the amount of any actual damage sustained by such person as a result of such failure; or

(B) any amount paid by the person to the credit repair organization.

(2) Punitive damages

(A) Individual actions

In the case of any action by an individual, such additional amount as the court may allow.

(B) Class actions

In the case of a class action, the sum of—

(i) the aggregate of the amount which the court may allow for each named plaintiff; and

(ii) the aggregate of the amount which the court may allow for each other class member, without regard to any minimum individual recovery.

(3) Attorneys' fees

In the case of any successful action to enforce any liability under paragraph (1) or (2), the costs of the action, together with reasonable attorneys' fees.

(b) Factors to be considered in awarding punitive damages

In determining the amount of any liability of any credit repair organization under subsection (a)(2) of this section, the court shall consider, among other relevant factors—

(1) the frequency and persistence of noncompliance by the credit repair organization;

(2) the nature of the noncompliance;

(3) the extent to which such noncompliance was intentional; and

(4) in the case of any class action, the number of consumers adversely affected.

(Pub. L. 90–321, title IV, § 409, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–459.)

§ 1679h. Administrative enforcement

(a) In general

Compliance with the requirements imposed under this subchapter with respect to credit repair organizations shall be enforced under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] by the Federal Trade Commission.

(b) Violations of this subchapter treated as violations of Federal Trade Commission Act

(1) In general

For the purpose of the exercise by the Federal Trade Commission of the Commission's functions and powers

under the Federal Trade Commission Act [15 U.S.C. 41 et seq.], any violation of any requirement or prohibition imposed under this subchapter with respect to credit repair organizations shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C. 45(a)].

(2) Enforcement authority under other law

All functions and powers of the Federal Trade Commission under the Federal Trade Commission Act shall be available to the Commission to enforce compliance with this subchapter by any person subject to enforcement by the Federal Trade Commission pursuant to this subsection, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of any Federal Trade Commission trade regulation rule, without regard to whether the credit repair organization—

(A) is engaged in commerce; or

(B) meets any other jurisdictional tests in the Federal Trade Commission Act.

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover damages for which the person is liable to such residents under section 1679g of this title as a result of the violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Commission

(A) Notice to Commission

The State shall serve prior written notice of any civil action under paragraph (1) upon the Federal Trade Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action.

(B) Intervention

The Commission shall have the right—

(i) to intervene in any action referred to in subparagraph (A);

(ii) upon so intervening, to be heard on all matters arising in the action; and

(iii) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation

Whenever the Federal Trade Commission has instituted a civil action for violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission for any violation of this subchapter that is alleged in that complaint.

(Pub. L. 90–321, title IV, § 410, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–460.)

REFERENCES IN TEXT

The Federal Trade Commission Act, referred to in subsecs. (a) and (b), is act Sept. 26, 1914, ch. 311, 38 Stat. 717, as amended, which is classified generally to subchapter I (§ 41 et seq.) of chapter 2 of this title. For complete classification of this Act to the Code, see section 58 of this title and Tables.

§ 1679i. Statute of limitations

Any action to enforce any liability under this subchapter may be brought before the later of—

(1) the end of the 5-year period beginning on the date of the occurrence of the violation involved; or

(2) in any case in which any credit repair organization has materially and willfully misrepresented any information which—

(A) the credit repair organization is required, by any provision of this subchapter, to disclose to any consumer; and

(B) is material to the establishment of the credit repair organization's liability to the consumer under this subchapter, the end of the 5-year period begin-

ning on the date of the discovery by the consumer of the misrepresentation.

(Pub. L. 90–321, title IV, § 411, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–461.)

§ 1679j. Relation to State law

This subchapter shall not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with any law of any State except to the extent that such law is inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(Pub. L. 90–321, title IV, § 412, as added Pub. L. 104–208, div. A, title II, § 2451, Sept. 30, 1996, 110 Stat. 3009–462.)

APPENDIX E

CROA Filings by Year & Circuit

1. 1996
2. 1997
   a. Sixth Circuit:
      i. **Sannes v. Jeff Wyler Chevrolet, Inc.**, 1999 WL 33313134, (S.D.Ohio Mar 31, 1999) (NO. C-1-97-930)
         1. Class Action: No
         2. Filed: 10/15/97
3. 1998
   a. Third Circuit:
      i. **In re National Credit Mgmt. Group, L.L.C.**, NO. 98-936 (AJL), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 21 F. Supp. 2d 424; 1998 U.S. Dist. LEXIS 6870, March 25, 1998, Decided , March 25, 1998, Original Filed
         1. Class Action: No
         2. Filed: 3/3/98
   b. Fifth Circuit:
      i. **U.S. v. Cornerstone Wealth Corp., Inc.**, Not Reported in F.Supp.2d, 2006 WL 522124, N.D. Tex., March 03, 2006 (NO. CIV.A.3:98CV0601-D)
         1. Class Action: No
         2. Filed: 3/4/98
   c. Seventh Circuit:
      i. **Nielsen v. United Creditors Alliance Corp.**, Not Reported in F.Supp.2d, 1999 WL 674740, N.D.Ill., August 23, 1999 (NO. 98 C 5910)
         1. Class action: Yes

2. Filed: 9/22/98

d. Ninth Circuit:

i. **F.T.C. v. Gill**,71 F.Supp.2d 1030, C.D.Cal., November 03, 1999 (NO. CV98-1436LGBMCX)

1. Class Action: No

2. Filed: 3/2/98

4. 1999

a. Seventh Circuit:

i. **Vance v. National Ben. Ass'n**, Not Reported in F.Supp.2d, 1999 WL 731764, N.D.Ill., August 30, 1999 (NO. 99 C 2627)

1. Class Action: No

2. Filed: 4/21/99

ii. **White v. Financial Credit Corp.**, Not Reported in F.Supp.2d, 2000 WL 816783, N.D.Ill., June 21, 2000 (NO. 99 C 4023, 99 C 5001)

1. Class Action: Yes

2. Filed: 4/8/99

iii. **Bigalke v. Creditrust Corp.**, 162 F.Supp.2d 996, N.D.Ill., August 08, 2001 (NO. 99 C 2303)

1. Class Action: Yes

2. Filed: 4/8/99

5. 2000

a. Second Circuit:

i. **Cooper v. Sunshine Recoveries, Inc.**, Not Reported in F.Supp.2d, 2001 WL 740765, S.D.N.Y., June 27, 2001 (NO. 00CIV8898 LTSJCF)

1. Class Action: Yes

2. Filed: 11/21/2000

b. Third Circuit:

i. **Orloff v. Syndicated Office Systems, Inc.**, 2004 WL 870691, *1 (E.D.Pa. Apr 22, 2004) (NO. CIV.A.00-CV-5355)

1. Class Action: Yes
2. Filed: 10/20/2000

6. 2001

a. Third Circuit:

i. **Oslan v. Collection Bureau of Hudson Valley**, Not Reported in F.Supp.2d, 2001 WL 34355648, E.D.Pa., December 13, 2001 (NO. CIV.A. 01-2173)

1. Class Action: Yes
2. 5/21/03

b. Seventh Circuit:

i. **Parker v. 1-800 Bar None, a Financial Corp., Inc.**, Not Reported in F.Supp.2d, 2002 WL 215530, N.D.Ill., February 12, 2002 (NO. 01 C 4488)

1. Class Action: No
2. Filed: 6/14/01

i. **Dortch v. Financing Alternative, Inc.**, Not Reported in F.Supp.2d, 2002 WL 598518, N.D.Ill., April 17, 2002 (NO. 01 C 7416)

1. Class Action: Yes
2. Filed: 9/25/01

ii. **Arnold v. Goldstar Financial Systems, Inc.**, Not Reported in F.Supp.2d, 2002 WL 1941546, N.D.Ill., August 22, 2002 (NO. 01 C 7694)

1. Class Action: Yes
2. Filed: 10/4/01

c. Eighth Circuit:

i. **Wojcik v. Courtesy Auto Sales, Inc.**, Not Reported in F.Supp.2d, 2002 WL 475173, D.Neb., March 29, 2002 (NO. 8:01CV506)

1. Class Action: No
2. Filed: 9/28/01

iii. **Cabrera v. Lake Manawa Nissan**, CASE NO. 1-01-CV-10032, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION, 2002 U.S. Dist. LEXIS 25945, November 18, 2002, Decided

1. Class Action: No
2. Filed: 8/8/01

d. Tenth Circuit:

i. **Roe v. Gray**, 165 F.Supp.2d 1164, D.Colo., October 10, 2001 (NO. CIV. A. 01-B-0409)

1. Class Action: Yes
2. Filed: 3/7/01

7. 2002

A. Third Circuit:

i. **Luqman v. Interbay Funding, L.L.C.**, 2003 WL 22594228, *1+ (E.D.Pa. Sep 30, 2003) (NO. CIV.A. 02-CV-7566)

1. Class Action: No
2. Filed: 9/27/02

b. Seventh Circuit:

i. **Lacey v. William Chrysler Plymouth Inc.**, Not Reported in F.Supp.2d, 2004 WL 415972, N.D.Ill., February 23, 2004 (NO. 02 C 7113)

1. Class Action: No
2. Filed: 10/3/02

8. 2003
   a. First Circuit:
      i. **Zimmerman v. Cambridge Credit Counseling Corp.**, 322 F.Supp.2d 95, D.Mass., June 24, 2004 (NO. CIV.A.03-30261-MAP)
         1. Class Action: Yes
         2. Filed: 11/3/2003
   b. Second Circuit:
      i. **Limpert v. Cambridge Credit Counseling Corp.,** 328 F.Supp.2d 360, 361+, RICO Bus.Disp.Guide 10,730, 10730+ (E.D.N.Y. Aug 05, 2004) (NO. CV-03-5986)
         1. Class Action: Yes
         2. Filed: 11/25/03
      ii. **Petrolito v. 1st Nat'l Credit Servs. Corp.**, Civil Action No. 3:03CV1085 (CFD) , UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, 2004 U.S. Dist. LEXIS 15758, August 10, 2004, Decided , As Amended, August 12, 2004. Dismissed without prejudice by, On reconsideration by Petrolito v. 1st Nat'l Credit Servs. Corp., 2005 U.S. Dist. LEXIS 1908 (D. Conn., Feb. 2, 2005)
         1. Class Action: No
         2. Filed: 6/20/03
   c. Third Circuit:
      i. **Pilgrim v. Metro Chrysler Plymouth Subaru**, Not Reported in F.Supp.2d, 2005 WL 61454, E.D.Pa., January 11, 2005 (NO. CIV.A.03-3219)
         1. Class action: No
         2. Filed: 5/21/03

d. Seventh Circuit:

i. **Iosello v. Lexington Law Firm**, Not Reported in F.Supp.2d, 2003 WL 21696991, N.D.Ill., July 21, 2003 (NO. 03 C 0987)

1. Class Action: Yes
2. Filed: 2/10/03

ii. **Shulman v. CRS Financial Services, Inc.**, Not Reported in F.Supp.2d, 2003 WL 22400211, N.D.Ill., October 21, 2003 (NO. 03 C 1634)

1. Class Action: Yes
2. Filed: 3/5/03

iii. **Rodrignez v. Lynch Ford, Inc.**, Not Reported in F.Supp.2d, 2004 WL 2958772, N.D.Ill., November 18, 2004 (NO. 03 C 7727)

1. Class Action: No
2. Filed: 10/30/03

iv. **Costa v. Mauro Chevrolet, Inc.**, 390 F.Supp.2d 720, N.D.Ill., July 18, 2005 (NO. 03 C 8223)

1. Class Action: No
2. Filed: 11/17/03

v. **Plattner v. Edge Solutions, Inc.**, 422 F.Supp.2d 969, N.D.Ill., March 22, 2006 (NO. 03 C 2646)

1. Class Action: No
2. Filed: 4/18/03

vi. **Iosello v. Lawrence**, 2005 WL 2007147, *1 (N.D.Ill. Aug 18, 2005) (NO. 03 C 987)

1. Class Action: Yes
2. Filed: 2/10/03

e. Ninth Circuit:

i. **Croxon v. Enterprise America**, Inc., 2009 WL 1331090, *1 (N.D.Cal. May 13, 2009) (NO. C 03-01144 JW)

1. Class Action: No
2. Filed: 3/17/03

f. Eleventh Circuit:

i. **Helms v. Consumerinfo.com, Inc.**, 436 F.Supp.2d 1220, N.D.Ala., February 14, 2005 (NO. CV 03 HS 1439 M)

1. Class Action: Yes
2. Filed: 6/17/03

9. 2004

a. Second Circuit:

i. **Cortese v. Edge Solutions, Inc.**, Not Reported in F.Supp.2d, 2007 WL 2782750, E.D.N.Y., September 24, 2007 (NO. CIVA040956 DRHARL)

1. Class Action: Yes
2. Filed: 3/05/04

b. Third Circuit

i. **Baker v. Family Credit Counseling Corp.**, 440 F.Supp.2d 392, RICO Bus.Disp.Guide 11,162, E.D.Pa., July 28, 2006 (NO. 04-5508)

1. Class Action: Yes
2. Filed: 11/23/04

ii. **Townes v. Trans Union, LLC**, Not Reported in F.Supp.2d, 2007 WL 2457484, D.Del., August 30, 2007 (NO. CIV.A. 04-1488-JJF)

1. Class Action: Yes
2. Filed: 12/1/04

c. Fourth Circuit:

i. **Polacsek v. Debticated Consumer Counseling, Inc.**, 413 F.Supp.2d 539, D.Md., November 23, 2005 (NO. CIV. PJM 04-631)

1. Class Action: Yes.

2. Filed: 3/1/04

d. Sixth Circuit:

i. **Asmar v. Benchmark Literacy Group, Inc.**, Not Reported in F.Supp.2d, 2005 WL 2562965, E.D.Mich., October 11, 2005 (NO. 04-70711)

1. Class Action: Yes

2. Filed: 2/25/04

e. Seventh Circuit:

i. **Banks v. Capital Credit Alliance, Inc.**, Not Reported in F.Supp.2d, 2005 WL 1563220, N.D.Ill., June 28, 2005 (NO. 04 C 6999)

1. Class Action: Yes

2. Filed: 10/29/04

ii. **D'Agostino v. Lawrence**, No. 04 C 3660 , UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, 2005 U.S. Dist. LEXIS 20731, March 9, 2005, Decided , March 9, 2005, Filed

1. Class Action: Yes

2. Filed: 5/26/04

f. Ninth Circuit:

i. **Browning v. Yahoo! Inc.**, Not Reported in F.Supp.2d, 2006 WL 1390555, N.D.Cal., May 19, 2006 (NO. C04-01463 HRL)

1. Class Action: Yes

2. Filed: 4/15/04

g. Eleventh Circuit:

i. **Hillis v. Equifax Consumer Services, Inc.**, 237 F.R.D. 491, N.D.Ga., August 18, 2006 (NO. CIV.A.1:04CV3400TCB)

1. Class Action: Yes
2. Filed: 11/19/04

10. 2005

a. First Circuit:

i. **In re Plamondon**, 2005 WL 3116569, *1, 2005 BNH 35, 035 (Bankr.D.N.H. Nov 14, 2005) (NO. 05-1058-JMD, 05-10592-JMD)

1. Class Action: No
2. Filed: 4/20/05

b. Second Circuit:

i. **Vertucci v. Orvis**, Not Reported in F.Supp.2d, 2006 WL 1688078, D.Conn., May 30, 2006 (NO. 3:05CV1307 (PCD))

1. Class Action: No
2. Filed: 8/18/05

ii. **Goktepe v. Lawrence**, 220 F.R.D. 8, 9, 58 Fed.R.Serv.3d 111, 111 (D.Conn. Jan 27, 2004) (NO. CIV.3:03CV89 (MRK))

1. Class Action: No
2. Filed: 1/13/05

c. Third Circuit:

i. **Millett v. Truelink, Inc.**, Not Reported in F.Supp.2d, 2006 WL 2583100, D.Del., September 07, 2006 (NO. CIV.05-599 SLR)

1. Class Action: Yes
2. Filed: 8/16/05

ii. **Gay v. CreditInform**, 511 F.3d 369, C.A.3 (Pa.), December 19, 2007 (NO. 06-4036)

1. Class action: Yes
2. Filed: 12/23/05

d. Fifth Circuit:

i. **Alexander v. U.S. Credit Management, Inc.**, 384 F.Supp.2d 1003, N.D.Tex., September 01, 2005 (NO. CIV.A. 3:05-CV-339-M)

1. Class Action: Yes
2. Filed: 2/18/05

ii. **In re Zuniga**, 332 B.R. 760, Bkrtcy.S.D.Tex., September 22, 2005 (NO. 05-33416-H4-7)

1. Class Action: No
2. Filed: 3/07/05

e. Sixth Circuit:

i. **Conley v. Aggeler**, Not Reported in F.Supp.2d, 2006 WL 461343, W.D.Mich., February 24, 2006 (NO. 1:05-CV-406)

1. Class Action: No
2. Filed: 6/10/05

ii. **Keener v. Shonowo**, Not Reported in F.Supp.2d, 2006 WL 2290519, M.D.Tenn., August 08, 2006 (NO. CIV. 3:05-0259)

1. Class Action: No
2. Filed: 3/31/05

iii. **Brown v. Advanced Realty Sys. LLC**, Case No. 1:05-CV-837 , UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, 2006 U.S. Dist. LEXIS 38722, June 12, 2006, Decided , June 12, 2006, Filed

1. Class Action: No
2. Filed: 12/16/05

f. Seventh Circuit:

i. **Kessler v. American Resorts International's Holiday Network, Ltd.**, Not Reported in F.Supp.2d, 2007 WL 4105204, N.D.Ill., November 14, 2007 (NO. 05 C 5944, 07 C 2439)

1. Class action: No
2. Filed: 10/14/05

g. Ninth Circuit:

i. **Slack v. Fair Isaac Corp.**, 390 F.Supp.2d 906, N.D.Cal., June 27, 2005 (NO. C 05-0257 MHP)

1. Class Action: Yes
2. Filed: 1/18/05

h. Tenth Circuit:

i. **In re Jensen**, 395 B.R. 472, Bkrtcy.D.Colo., September 30, 2008 (NO. ADV.05-1940-EEB, BKR.05-28263 EEB)

1. Class action: No
2. Filed: 11/11/05

i. Eleventh Circuit:

i. **In re Wright**, Not Reported in B.R., 2007 WL 1459475, Bkrtcy.N.D.Ala., May 16, 2007 (NO. 05-40829JJR13, ADV. 05-40186)

1. Class Action: No
2. Filed: 3/11/05

11. 2006

a. Second Circuit:

i. **Spencer v. Arizona Premium Finance Co.**, Inc., 2008 WL 5432245, *1 (W.D.N.Y. Dec 30, 2008) (NO. 06-CV-160S

1. Class Action: No
2. Filed: 3/16/06

b. Third Circuit:

i. **Poskin v. TD Banknorth, N.A.**, 687 F.Supp.2d 530, W.D.Pa., September 11, 2009 (NO. CIV.A. 06-463)

1. Class Action: No
2. Filed: 4/27/06

c. Fourth Circuit:

i. **Stith v. Thorne**, 247 F.R.D. 89, 92 (E.D.Va. Nov 26, 2007) (NO. 3:06CV240); 88 F.Supp.2d 534, 538 (E.D.Va. May 29, 2007) (NO. 3:06 CV 240)

1. Class Action: No
2. Filed: 4/10/06

d. Sixth Circuit:

i. **Rex v. CSA-Credit Solutions of America, Inc.**, 507 F.Supp.2d 788, W.D.Mich., June 27, 2007 (NO. 106-CV-633)

1. Class Action: No
2. Filed: 9/1/06

e. Ninth Circuit:

i. **Rannis v. Fair Credit Lawyers, Inc.**, 489 F.Supp.2d 1110, C.D.Cal., May 23, 2007 (NO. EDCV 06 0373 AG JCX)

1. Class Action: Yes
2. Filed: 4/6/06

12. 2007

a. Second Circuit:

i. **Henry v. Westchester Foreign Autos, Inc.**, 522 F.Supp.2d 610, S.D.N.Y., November 09, 2007 (NO. 07 CV. 1363 (CLB))

1. Class Action: No
2. Filed: 2/23/07

ii. **Flemming v. Goodwill Mortg. Services, LLC**, 648 F.Supp.2d 292, D.Conn., August 27, 2009 (NO. CIV.3:07CV00803AWT)

1. Class Action: No
2. Filed: 5/21/07

b. Fourth Circuit:

i. **Bentley v. Alan Vester Auto Group, inc**., 2009 WL 3125539, *1 (E.D.N.C. Sep 29, 2009) (NO. 5:07-CV-434-F)

1. Class Action: No
2. Filed: 11/7/07

ii. **Nixon v. Alan Vester Auto Group, Inc**., 2008 WL 4544369, *1 (M.D.N.C. Oct 08, 2008) (NO. 1:07 CV 839)

1. Class Action: Yes
2. Filed: 11/2/07

c. Sixth Circuit:

i. **Deans v. Long Beach Mortg. Co.**, Not Reported in F.Supp.2d, 2007 WL 772892, W.D.Mich., March 12, 2007 (NO. 1:07-CV-205)

1. Class Action: No
2. Filed: 3/6/07

ii. **Schultz v. Burton-Moore Ford, Inc.**, Not Reported in F.Supp.2d, 2008 WL 2355588, E.D.Mich., June 05, 2008 (NO. 07-13932-BC)

1. Class Action: No
2. Filed: 9/18/07

iii. **Jackson v. Telegraph Chrysler Jeep, Inc.**, Not Reported in F.Supp.2d, 2009 WL 928224, E.D.Mich., March 31, 2009 (NO. 07-10489)

1. Class Action: No
2. Filed: 1/31/07

iv. **Vegter v. Forecast Financial Corp**., 2007 WL 4178947, *1 (W.D.Mich. Nov 20, 2007) (NO. 1:07-CV-279)

1. Class Action: No.
2. Filed: 3/26/07

d, Seventh Circuit:

i. **Pena v. Freedom Mortg. Team, Inc.**, Not Reported in F.Supp.2d, 2007 WL 3223394, N.D.Ill., October 24, 2007 (NO. 07 C 552)

1. Class Action: Yes
2. Filed: 1/31/07

ii. **Martinez v. Freedom Mortg. Team, Inc.**, 527 F.Supp.2d 827, N.D.Ill., December 19, 2007 (NO. 07 C 3442)

1. Class action: No
2. Filed: 6/19/07

iii. **Newman v. Apex Financial Group, Inc.**, Not Reported in F.Supp.2d, 2008 WL 130924, N.D.Ill., January 11, 2008 (NO. 07 C 4475)

1. Class Action: No
2. Filed: 8/8/07

iv. **Ware v. Indymac Bank, FSB**, 534 F.Supp.2d 835, N.D.Ill., February 14, 2008 (NO. 07 C 1982)

1. Class Action: Not as to CROA
2. Filed: 4/10/07

e. Eighth Circuit:

i. **Schreiner v. Credit Advisors, Inc.,** 2007 WL 2904098, *4 (D.Neb. Oct 02, 2007) (NO. 8:07CV78)

1. Class Action: Yes
2. Filed: 2/20/07

f. Ninth Circuit:

i. **Abat v. Chase Bank USA, N.A.**, 2010 WL 3632809, C.D.Cal., September 14, 2010 (NO. SACV 07-01476-CJC)

1. Class Action: Yes
2. Filed: 12/28/07

ii. **Wagner v. Choice Home Lending**, 266 F.R.D. 354, D.Ariz., September 29, 2009 (NO. CV-07-02136-PHX-ROSW)

1. Class Action: No
2. Filed: 11/1/07

iii. **Mason v. CreditAnswers**, LLC, 2008 WL 4165155, *1 (S.D.Cal. Sep 05, 2008) (NO. 07CV1919-L(POR))

1. Class Action: No
2. Filed: 10/1/07

iv. **Yang v. DTS Financial Group**, 570 F.Supp.2d 1257, 1258 (S.D.Cal. Aug 12, 2008) (NO. 07CV1731 JLS WMC)

1. Class Action: No
2. Filed: 9/10/07

g. Tenth Circuit:

i. **Dilley v. Academy Credit, LLC**, Not Reported in F.Supp.2d, 2008 WL 4527053, D.Utah, September 29, 2008 (NO. 2:07CV301DAK)

1. Class Action: Yes
2. Filed: 8/07/07

h. Eleventh Circuit:

i. **Reynolds v. Credit Solutions, Inc.**, 541 F.Supp.2d 1248, N.D.Ala., February 26, 2008 (NO. CIV.A. 07-AR-1516-S)

1. Class Action: No
2. Filed: 8/17/07

ii. **In re Barnes**, 397 B.R. 149, Bkrtcy.N.D.Ala., November 13, 2008 (NO. BK 07-71949CMS13, AP 08-70016-CMS)

1. Class Action: Yes
2. Filed: 10/31/07

13. 2008

a. Second Circuit:

i. **Thrane v. Franklin First Financial, Ltd.**, 266 F.R.D. 51, E.D.N.Y., March 12, 2010 (NO. 08CV4149ADSARL)

1. Class Action: No
2. Filed: 10/10/08

b. Third Circuit:

i. **Rodriguez v. Master Cars USA, Inc.**, 2008 WL 3200683, *1 (D.N.J. Aug 06, 2008) (NO. CIV. A. 08-2376 JLL)

1. Class Action: No
2. Filed: 5/15/08

c. Fourth Circuit:

i. **Cappetta v. GC Services Ltd. Partnership**, Not Reported in F.Supp.2d, 2008 WL 5377934, E.D.Va., December 24, 2008 (NO. CIV. A. 3:08CV288)

1. Class action: No
2. Filed: 5/09/08

ii. **Kindred v. McLeod**, Slip Copy, 2010 WL 4814360, RICO Bus.Disp.Guide 11,955, W.D.Va., November 19, 2010 (NO. 3:08CV00019)

1. Class Action: No
2. Filed: 4/8/08

iii. **Capital One Bank (USA) N.A. v. rless Kennedy Chartered, LLC**, 2008 WL 4467160, *1 (E.D.Va. Sep 30, 2008) (NO. 3:08CV147)

1. Class Action: No
2. Filed: 3/6/08

d. Seventh Circuit:

i. **Whitley v. Taylor Bean & Whitacker Mortg. Corp.**, 607 F.Supp.2d 885, N.D.Ill., April 20, 2009 (NO. 08 C 3114)

1. Class action: No
2. Filed: 5/30/08

e. Ninth Circuit:

i. **Greenwood v. Compucredit Corp.**, 617 F.Supp.2d 980, N.D.Cal., April 01, 2009 (NO. C 08-04878 CW)

1. Class action: Yes
2. Filed: 10/24/08

f. Tenth Circuit:

i. **Finely v. CSA-Credit Solutions of America, Inc.**, Not Reported in F.Supp.2d, 2008 WL 5280551, E.D.Okla., December 18, 2008 (NO. CIV-08-250-RAW)

1. Class Action: No
2. Filed: 7/3/08

g. Eleventh Circuit:

i. **F.T.C. v. RCA Credit Services, LLC**, Not Reported in F.Supp.2d, 2008 WL 5428039,

M.D.Fla., December 31, 2008 (NO. 8:08-CV-2062-T27MAP)

1. Class Action: No
2. Filed: 10/16/08

ii. **Lopez v. ML #3, LLC**, 607 F.Supp.2d 1310, 21 Fla. L. Weekly Fed. D 681, N.D.Fla., April 15, 2009 (NO. 4:08CV579-RH/WCS)

1. Class Action: No
2. Filed: 12/24/08

iii. **Hyppolite v. Citi Residential Lending, Inc.**, Not Reported in F.Supp.2d, 2009 WL 1109320, S.D.Fla., April 24, 2009 (NO. 08-62022-CIV)

1. Class Action: No
2. Filed: 12/17/08

iv. **Moret v. Select Portfolio Servicing, Inc.**, Not Reported in F.Supp.2d, 2009 WL 1288062, S.D.Fla., May 06, 2009 (NO. 08-61996-CIV)

1. Class action: No
2. Filed: 12/12/08

v. **Silva v. Countrywide Home Loans, Inc.**, Slip Copy, 2009 WL 2046164, S.D.Fla., July 09, 2009 (NO. 08-62098-CIV)

1. Class action: No
2. Filed: 12/31/08

iv. **St. Louis v. Countrywide Home Loans, Inc.**, Slip Copy, 2009 WL 2046162, S.D.Fla., July 09, 2009 (NO. 08-23518-CIV)

1. Class action: No
2. Filed: 12/22/08

vii. **Tejada v. Countrywide Home Loans, Inc.**, Slip Copy, 2009 WL 2046158, S.D.Fla., July 09, 2009 (NO. 08-61978-CIV)

1. Class action: No.
2. Filed: 12/11/08

viii. **Washington v. Countrywide Home Loans, Inc.**, Slip Copy, 2009 WL 2046155, S.D.Fla., July 09, 2009 (NO. 08-10115-CIV)

1. Class action: No
2. Filed: 12/31/08

ix. **Alvarez v. Countrywide Home Loans, Inc.**, Slip Copy, 2009 WL 2046152, S.D.Fla., July 09, 2009 (NO. 08-23505-CIV)

1. Class Action: No
2. Filed: 12/19/08

x. **Bien-Aime v. EMC Mortg. Corp.**, Slip Copy, 2009 WL 2046150, S.D.Fla., July 09, 2009 (NO. 08-61995-CIV)

1. Class action: No
2. Filed 12/12/08

xi. **Buteau v. Countrywide Home Loans, Inc.**, Slip Copy, 2009 WL 2046143, S.D.Fla., July 09, 2009 (NO. 08-81552-CIV)

1. Class Action: No
2. Filed: 12/22/08

xii. **Petilien v. Countrywide Home Loans, Inc.**, Slip Copy, 2009 WL 2046142, S.D.Fla., July 09, 2009 (NO. 08-61982-CIV

1. Class action: No
2. Filed: 12/11/08

xiii. **Tejada v. Countrywide Home Loans, Inc.**, Slip Copy, 2009 WL 2046141, S.D.Fla., July 09, 2009 (NO. 08-61992-CIV)

1. Class action No
2. Filed: 12/12/08

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i. **Zimmerman v. Logemann**, Not Reported in F.Supp.2d, 2009 WL 4407205, W.D.Wis., November 30, 2009 (NO. 09-CV-210-SLC)

1. Class Action: No
2. Filed: 4/09/09

e. Eighth Circuit:

i. **Mongold v. Universal Nationwide, L.L.C.**, Not Reported in F.Supp.2d, 2009 WL 3297508, D.Neb., October 13, 2009 (NO. 8:09CV86)

1. Class Action: Yes
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i. **Stanton v. Bank of America, N.A.**, Slip Copy, 2010 WL 4176375, D.Hawai'i, October 19, 2010 (NO. CV 09-00404 DAE-LEK)

1. Class Action: No
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1. Class action: No
2. Filed: 10/16/08

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i. **Zimmermann v. Epstein Becker and Green, P.C.**, Slip Copy, 2010 WL 2724001, D.Mass., July 08, 2010 (NO. 09-CV-30194-MAP)

1. Class Action: Yes
2. Filed: 11/10/2009

ii. **Mantz v. Wells Fargo Bank, N.A.**, Slip Copy, 2011 WL 196915, D.Mass., January 19, 2011 (NO. CIV.A. 09-12010-JLT)

1. Class action: No
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i. **Mack v. Bear Stearns Residential Mortg. Corp.**,2010 WL 5136033, E.D.Pa., November 30, 2010 (NO. CIV.A. 09 - 5370)

1. Class Action: No
2. Filed: 1/13/09

c. Fourth Circuit:

i. **Berry v. Cook Motor Cars**, Ltd., 2009 WL 1971391, *1 (D.Md. Jun 29, 2009) (NO. CIVIL AMD 09-426)

1. Class Action: No
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1. Class action: No
2. Filed: 4/10/09

iii. **Citibank (South Dakota), N.A. v. Duncan**, 2010 WL 379869, *1 (M.D.Ala. Jan 25, 2010) (NO. 209-CV-868-WKW WO)

1. Class Action: Yes
2. Filed: 9/11/09

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i. **Rice v. Greenhaven Group, LLC**, Slip Copy, 2011 WL 43481, D.Minn., January 06, 2011 (NO. 10-3830 RHK/JJK)

1. Class action: No
2. Filed: 9/2/2010

b. Ninth Circuit:

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1. Class Action: Yes
2. Filed: 2/11/10

ii. **Billing v. CSA-Credit Solutions of America, Inc.**, Slip Copy, 2010 WL 2542275, S.D.Cal., June 22, 2010 (NO. 10-CV-0108 BEN (NLS))

1. Class Action: Yes
2. Filed: 1/14/10

iii. **DuCharme v. Heath**, 2010 WL 5211502, *3 (N.D.Cal. Dec 16, 2010) (NO. C 10-02763 CRB)

1. Class Action: Yes
2. Filed: 6/24/10

REPLY BRIEF

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IN THE

Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
Petitioners,

v.

WANDA GREENWOOD *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

As respondents readily acknowledge, and as the Ninth Circuit expressly recognized in its decision below, the courts of appeals are squarely divided on the question whether claims under the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.*, are subject to arbitration. Respondents nevertheless oppose review on essentially three grounds. None is persuasive.

First, respondents contend that, notwithstanding the conflict among the circuits, the Court should deny certiorari because claims under the CROA do not arise with great frequency. Respondents' own figures show just the opposite, however. Moreover, respondents do not dispute that three courts of appeals, as well as numerous district courts outside those circuits, have recently considered whether CROA claims are subject to arbitration, confirming that the question is an important and recurring one.

Second, respondents assert that this case constitutes a questionable vehicle for resolving the question presented because, even if the Court were to grant certiorari and reverse the Ninth Circuit's decision, the arbitration agreement at issue may later be deemed unenforceable on remand for a reason having nothing to do with the question presented. Respondents' argument for why the agreement at issue may later be deemed unenforceable is entirely meritless. And even if there were any merit to the argument, neither court below considered it, with both courts instead squarely deciding the question presented on the assumption of the existence of a valid agreement to arbitrate. This Court should consider

the question presented on the same understanding, and its resolution of the question in petitioners' favor would necessarily compel reversal of the decision below (and of course would resolve the circuit conflict).

Third, respondents argue that the Ninth Circuit was correct in deciding that CROA claims are not subject to arbitration. Even if the Ninth Circuit's decision were correct on the merits, however, this Court's review is warranted to resolve the conflict among the courts of appeals. In any event, the Ninth Circuit fundamentally erred in holding—in conflict with the decisions of the Third and Eleventh Circuits—that claims arising under CROA are non-arbitrable. The Ninth Circuit's analysis is inconsistent with the language of CROA, with the Federal Arbitration Act (FAA), and with decisions of this Court. Judge Tashima, dissenting below, accordingly explained that the court "should not lightly create a circuit split on an issue of national application on the basis of the flimsy evidence on which the majority relies." Pet. App. 27a-28a. This Court's review is warranted.

A. The Petition Presents a Question of National Importance Over Which the Courts of Appeals are Divided

As respondents acknowledge, the "decision of the Ninth Circuit obviously conflicts with the decisions of the Third and Eleventh Circuits." Opp. 8. *Compare Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007) (holding CROA claims are subject to arbitration), *and Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009) (same), *with* App. 23a (holding CROA claims are not subject to arbitration). Re-

spondents argue, however, that the Petition fails to demonstrate compelling reasons to grant certiorari because claims under the CROA do not arise with great frequency. Opp. 8-9.

Respondents are wrong, as their own data amply demonstrates. Even considering only those cases that turn up in a search of online databases, respondents' own inquiry shows there were well over 100 reported cases raising CROA claims from 2000 to 2010, with 76 cases since 2005. Opp. 9-10. Indeed, respondents' figures reinforce the importance of the particular circuit split at issue: 42% of all CROA claims, and 43% of all CROA class actions, have been filed in the Third, Ninth, and Eleventh Circuits. Opp. 9. To be sure, claims under the CROA may not arise as frequently as claims under the Truth in Lending Act or the Fair Credit Reporting Act. Opp. 11. That hardly renders the CROA—or the particular question presented here—unimportant or unworthy of this Court's review.

Moreover, three courts of appeals issued conflicting decisions on the question presented in the three-year period culminating in the Ninth Circuit's decision below. And as the Petition explains (at 14-15), a number of district courts outside those three circuits have recently confronted the question whether CROA claims are arbitrable (and have reached divergent conclusions). *See, e.g.*, *Rex v. CSA-Credit Solutions of Am., Inc.*, 507 F. Supp. 2d 788 (W.D. Mich. 2007) (CROA claims subject to arbitration); *Schreiner v. Credit Advisors, Inc.*, No. 8:07CV78, 2007 U.S. Dist. LEXIS 74014 (D. Neb. Oct. 2, 2007) (same); *Vegter v. Forecast Fin. Corp.*, No. 1:07-CV-279, 2007 U.S. Dist. LEXIS 85653 (W.D. Mich. Nov.

20, 2007) (same); *Alexander* v. *U.S. Credit Mgmt.*, 384 F. Supp. 2d 1003 (N.D. Tex. 2005) (CROA claims not subject to arbitration); *see also Ace Am. Ins. Co. v. Ascend One Corp.*, No. CCB-06-CV-3371, 2007 WL 1774495 (D. Md. June 15, 2007) (involving agreement to arbitrate CROA claims; court did not consider whether CROA claims are arbitrable); *Vertucci v. Orvis*, No. 3:05 CV 1307, 2006 WL 1688078 (D. Conn. May 30, 2006) (same); *Arnold v. Goldstar Fin. Sys., Inc.*, No. 01 C 7694, 2002 WL 1941546 (N.D. Ill. Aug. 22, 2002) (same). There is thus no serious argument that the question presented—which has divided the lower courts—fails to constitute a recurring and important question.

What is more, the question presented will only grow in importance. As the Petition explains (at 15), the number of personal bankruptcies has grown substantially in recent years; and as respondents do not dispute, the increase in the number of consumers with poor credit will result in an increased demand for the services of credit repair organizations. Respondents note that, whereas personal bankruptcies increased from 2007-2009, there was no "explosion" of CROA suits from 2007 to 2009. Opp. 10. But one of course would expect a lag period between a rise in the demand for credit repair services and an ensuing rise in the number of lawsuits against credit repair organizations. In this case itself, for instance, respondents applied for and received the Aspire Visa card in 2005, but did not file this suit until the end of 2008. At any rate, whether or not the question presented will grow in importance in coming years, it already (and readily) qualifies as sufficiently impor-

tant to warrant the Court's grant of review to resolve the conflict among the courts of appeals.

Finally, unless this Court grants certiorari, the Ninth Circuit's prohibition against arbitration of CROA claims will effectively become a nationwide rule in CROA class actions. Pet. 13-14. As respondents' data confirms (Opp. 9), CROA claims are frequently brought as class actions. In such cases, there ordinarily would be little difficulty identifying a named plaintiff who resides within the Ninth Circuit's expansive geographic bounds, enabling plaintiffs who seek to avoid enforcement of arbitration agreements to file and maintain their CROA action within that circuit. Respondents fundamentally miss the point in suggesting that "class actions that are truly forum-shopped to the Ninth Circuit" may be "transferred elsewhere under 28 U.S.C. § 1404(a)." Opp. 12. While transfer might be appropriate if the sole connection to the Ninth Circuit were the defendant's conduct of business there, respondents themselves acknowledge that "lawyers could always look for a named class-action plaintiff residing in the Ninth Circuit," Opp. 12 n.4, in which event the action would presumably remain in the Ninth Circuit. The Ninth Circuit's position on the question presented thus could largely become a national rule unless this Court grants review.

B. The Petition Presents a Highly Suitable Vehicle for Resolving the Question Presented

The Petition presents a highly favorable vehicle for resolving the question presented because there is no dispute that the agreement between respondents

and petitioners calls for arbitration of actions like this one, *i.e.*, actions brought under the CROA. Pet. 15-16. Respondents nonetheless contend that the suitability of this case as a vehicle for resolving the question presented "is debatable" because, even if the Ninth Circuit erred in ruling that CROA claims are non-arbitrable, the arbitration agreement at issue here "may" later be deemed unenforceable for an entirely *different* reason. Opp. 13. In particular, respondents assert that the arbitration agreement may be unenforceable because the National Arbitration Forum (NAF)—the agreement's primary chosen arbitrator—no longer arbitrates consumer disputes. Opp. 4-5, 13. Respondents' argument is wholly unavailing.

To begin with, the sole question reached by both courts below was whether CROA claims are subject to arbitration. Both courts considered that question on the unchallenged assumption that the arbitration agreement at issue requires arbitration of CROA claims, and on the further assumption that the agreement is otherwise enforceable. Thus, a ruling by this Court that CROA claims are arbitrable not only would resolve the division among the courts of appeals, but also would necessarily require a reversal of the decisions below. The fact that respondents might *later* press some *independent* basis to preclude arbitration on remand—even assuming their position had any merit—would in no way affect this Court's consideration of the question presented and its resolution of the circuit conflict.*

---

* Respondents err in suggesting (Opp. 4) that the question presented is inaccurate in asking whether CROA claims are

In any event, there is simply no merit to respondents' contention that the arbitration agreement at issue may be unenforceable because the NAF no longer arbitrates consumer disputes. The agreement specifies that, "[i]f for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, *we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure*." Pet. App. 5a (emphasis added). Respondents' suggestion that there exists no other qualifying arbitration organization is specious; such organizations (*e.g.*, JAMS) plainly exist. And at any rate, the FAA itself mandates that

> "if for any ... reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy *the court shall designate and appoint an arbitrator or arbitrators or umpire*, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein ...."

---

arbitrable pursuant to "a valid arbitration agreement." The Ninth Circuit held that CROA claims are non-arbitrable even when there is a valid arbitration agreement, and the circuits are divided on that precise question. Respondents also err in objecting to petitioners' statement that "there is no dispute that the agreements between respondents and petitioners call for arbitration of actions like this one." Opp. 4 (quoting Pet. 15-16) (internal quotation marks omitted). Respondents in fact do not dispute that the arbitration agreement at issue calls for arbitration of CROA actions like this one, or that resolution of the question presented would lead to reversal of the decision below.

9 U.S.C. § 5 (emphasis added). Accordingly, even if the parties' agreement did not itself provide for a substitute arbitrator, federal law would.

Indeed, if there were any merit whatsoever to respondents' argument that the arbitration agreement is unenforceable because the NAF no longer arbitrates consumer disputes, one would have expected the court of appeals—to which the issue was fully briefed—to have at least considered it before creating a circuit conflict on an important question of federal law. Instead, the Ninth Circuit assumed that the agreement in this case would otherwise be enforceable and ruled categorically that CROA claims are non-arbitrable. As a result of that decision, the enforceability of an agreement to arbitrate a CROA claim depends entirely on the circuit in which the plaintiff elects to file suit. That state of affairs is intolerable, and this Court's review is warranted.

C. The Court of Appeals Erred in Holding That CROA Claims Are Not Subject to Arbitration

Respondents devote the bulk of their opposition (Opp. 15-27) to arguing the merits of the question whether CROA claims are subject to arbitration. Respondents' merits arguments afford no basis for denying certiorari, and in any event are wholly unpersuasive. The Ninth Circuit fundamentally erred in holding that CROA claims are non-arbitrable.

Respondents accept this Court's repeatedly stated "presumption in favor of arbitration." Opp. 21; *see also Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1986) (explaining that the FAA institutes a "federal policy favoring arbitration" and that courts

therefore must "rigorously enforce agreements to arbitrate" (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985))). Respondents argue, however, that three provisions of the CROA when considered together—the "right to sue" disclosure provision of 15 U.S.C. § 1679c(a), the civil-liability provision of § 1679g, and the anti-waiver provision of § 1679f(a)—overcome this strong presumption. Opp. 15-27. Respondents are wrong.

1. Respondents' argument is predicated entirely on the proposition that the CROA disclosure provision, § 1679c(a), "confers a right to sue" a credit repair organization. Opp. 17. But the only "right" the CROA disclosure provision "confers" is the right of the consumer to receive from a credit repair organization a written disclosure, which includes the statement, "You have a right to sue a credit repair organization that violates the [CROA]." 15 U.S.C. § 1679c(a). The "right to sue" language in the required disclosure does not *create* a right; it *describes* the CROA's civil-liability provision, which establishes a damages cause of action under the CROA. Thus, the scope of the consumer's "right to sue" is established by the civil-liability provision, not the disclosure provision. And the civil-liability provision says only that "[a]ny person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount determined under a framework set forth in the statute. 15 U.S.C. § 1679g(a). It says nothing about arbitration, and respondents do not contend otherwise.

Even if, as respondents argue, the "right to sue" disclosure provision did define the scope of the CROA civil-liability provision—rather than the other way around—the term "right to sue" still would not require an exclusively judicial forum. The "right to sue" language is directed to lay consumers, not lawyers. And as amicus curiae DRI explains, mainstream (as opposed to legal) dictionaries do not limit the word "sue" to a judicial process. DRI Br. 11. At the very least, the term "right to sue" *can* mean the right to initiate a legal process, either inside or outside of court. And given the presumption in favor of arbitration, the statute should be read to allow arbitration, not to preclude it.

2. Even if the civil-liability provision, read in light of the "right to sue" disclosure provision, creates an exclusive judicial remedy, that does not mean that a waiver of a judicial forum is unenforceable. On the contrary, this Court has repeatedly upheld the enforceability of agreements to arbitrate claims under statutes unambiguously creating exclusively judicial causes of action. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (holding that claim under Age Discrimination in Employment Act—which says that "Any person aggrieved may bring a civil action in any court of competent jurisdiction," 29 U.S.C. § 626(c)(1)—is arbitrable).

Respondents thus rely on the CROA's anti-waiver provision, which declares void "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under [the CROA]." 15 U.S.C. § 1679f(a). Respondents assert that a consumer's right to bring suit—by hypothesis, only in court—is a

"right of the consumer" that is non-waivable under § 1679f(a). That is incorrect. The anti-waiver provision prohibits waiver only of a consumer's substantive rights, as the provision's title—"Noncompliance with this subchapter"—makes clear. Thus, the CROA contains no prohibition against waivers of a consumer's purported right to sue in court.

Moreover, as the Petition explains (at 20-21), the text of the anti-waiver provision demonstrates that Congress *affirmatively intended* for CROA claims to be arbitrable, because it precludes enforcement of covered waivers "by any Federal or State court *or any other person*." 15 U.S.C. § 1679f(a) (emphasis added). Respondents attempt to explain the italicized language by observing that "the CROA creates non-waivable consumer rights and protections other than the right to sue, which could arise in an arbitration proceeding brought by a credit-repair organization against a consumer." Opp. 19. But even if that were one plausible explanation for the "any other person" language, the much more natural interpretation is simply that Congress generally expected arbitrators to adjudicate CROA claims no differently than claims under any other statute.

Finally, even if respondents' reading of the statute were otherwise plausible, it would still fail to overcome the strong presumption in favor of arbitration. Congress was well aware of that presumption when it enacted the CROA. If Congress had intended to overcome the presumption and preclude arbitration of CROA claims, it would have said so expressly, as it plainly knows how to do. *See, e.g.*, 7 U.S.C. § 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement

requires arbitration of a dispute arising under this section."). Yet there is nothing in the text of the CROA (or its legislative history) suggesting any intent whatsoever to preclude arbitration of CROA claims. Respondents thus err in their defense of the Ninth Circuit's decision. This Court should grant review to correct that decision and resolve the conflict among the courts of appeals.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

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For The Ninth Circuit

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association ("CDIA") provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of CDIA stock.

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners, CompuCredit Corporation and Synovus Bank (*hereinafter*, collectively, "CompuCredit").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information products and services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies in the marketplace. CDIA is the largest trade association of its kind in the world.

In its more than 100-year history, CDIA has worked with the United States Congress and state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of

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[1] The parties were notified of CDIA's intention to file this brief in accordance with Rule 37.2(a). All parties have consented to the filing of CDIA's *amicus* brief. CDIA's letters requesting consent and the parties' responses have been filed with the Clerk of Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

consumer report information and other credit-related information products and services.

CDIA is vitally interested in the outcome of this appeal because the Ninth Circuit Court of Appeals' ("Ninth Circuit") decision undermines the enforceability of binding arbitration agreements and creates an irreconcilable conflict with the decisions of two other Circuit Courts of Appeals. The court's decision directly impacts many of CDIA's members who provide credit-related information products and services (*e.g.*, credit monitoring) in interstate commerce and rely upon the enforceability of arbitration agreements subject to the Federal Arbitration Act ("FAA").[2]

Having participated as *amicus curiae* in the Eleventh Circuit's decision addressing the issue that is now before this court,[3] and having been involved in the consumer information products and services industry for more than a century, CDIA believes it can provide this Court with the context and perspective necessary to consider the implications of the Ninth Circuit's decision if not corrected.

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[2] 9 U.S.C. §§ 1 *et seq.*

[3] *See, Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

Left uncorrected, the Ninth Circuit's decision undermines the strong Congressional policy favoring arbitration that is expressed in the FAA. By misreading the Credit Repair Organizations Act's ("CROA") consumer notice requirement to provide consumers with a right to sue and interpreting that right to make courts the exclusive forum for consumers' CROA claims, the Ninth Circuit's decision prohibits the enforcement of written arbitration agreements in any district court in the Ninth Circuit if a plaintiff alleges a CROA violation. Because CROA's actual language does not preclude the waiver of court-based remedies through binding arbitration agreements, the Ninth Circuit's decision represents a return to the judicial hostility to arbitration that the FAA was enacted to overcome.

The providers of many credit-related education products and services, such as credit monitoring, rely upon the enforceability of arbitration agreements to predictably manage their litigation costs. If those agreements cannot be enforced and if the providers must contend with the prospect of having to participate in court-based litigation to resolve consumer disputes, many providers will either exit the business or pass along the costs of these uncertainties to consumers through higher prices for their products and services. Because the private sector has been recognized by the federal government as perhaps the most efficient provider of credit-related information

products and services that promote consumer financial literacy,[4] the Ninth Circuit's decision will harm the very consumers the Ninth Circuit seeks to protect through its interpretation of CROA's anti-waiver provision.

To restore the strong federal policy favoring arbitration and to avoid the harm to consumers and to the providers of credit-related information products and services that will result from the Ninth Circuit's decision, this Court should grant CompuCredit's petition and decide the important question of whether CROA's anti-waiver provision invalidates all arbitration agreements once a plaintiff has alleged a CROA claim.

ARGUMENT

CDIA agrees with and joins in the arguments of CompuCredit that the Ninth Circuit's decision is in direct conflict with the decisions of the Third and Eleventh Circuit Courts of Appeals and that the issue presented in CompuCredit's petition is an important question of federal law that should be settled by this Court.

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[4] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (*hereinafter,* "FTC, *Report to Congress*") at 76-77 (Dec. 2004) available at http://www.ftc.gov/reports/facta/041209factarpt.pdf.

Because the Ninth Circuit's decision undermines the enforceability of binding arbitration agreements and creates an irreconcilable conflict with the decisions of two other Circuit Courts of Appeals that will directly impact the providers of credit-related information products and services, such as credit monitoring, who rely upon the enforceability of arbitration agreements subject to the FAA, CDIA provides its separate brief to explain the importance of the issue presented and the harm that will be experienced by consumers if the Ninth Circuit's decision is not corrected.

I. THE NINTH CIRCUIT'S DECISION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. The Ninth Circuit's Decision Undermines the Expressed Intent of Congress.

The FAA provides that:

> A written provision in any . . . contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[5]

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[5] 9 U.S.C. § 2.

This Court has described the "basic purpose" of the FAA as "overcom[ing] courts' refusal to enforce agreements to arbitrate," and Congress' motivation for the FAA, as "first and foremost," to change the courts' anti-arbitration rule.[6] According to this Court, "in enacting the FAA, [Congress] took pains to utilize as much power as it could" under the Commerce Clause.[7] When any federal court considers whether Congress intended to preclude arbitration, this Court explained that the court should keep in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[8]

The Ninth Circuit's decision acknowledges that Congress "manifested a 'liberal federal policy favoring arbitration agreements'" in the FAA,[9] and that a party "should be held" to "the bargain to arbitrate" a dispute absent an "evinced" intention of Congress to preclude the waiver of court-based remedies.[10] The court even recites this Court's well-settled rule that the party opposing arbitration bears the burden "to

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[6] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-271 (1995).

[7] *Id.* at 275.

[8] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (2000).

[9] *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1207 (9th Cir. 2010).

[10] *Id.* (quoting from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."[11]

Despite the Ninth Circuit's acknowledgment of the above interpretive principles, and its recognition that plaintiffs agreed in writing to submit their claims to arbitration,[12] the court nonetheless held that the parties' arbitration agreement was void because the plaintiffs alleged CROA claims against CompuCredit.[13] For the court, plaintiffs overcame Congress' strong policy favoring arbitration simply by alleging a CROA claim.[14]

The Ninth Circuit reached its conclusion after framing the dispositive issue in a way that could lead only to a result that is contrary to this Court's FAA precedent and is unsupported by CROA's actual language:

> This appeal presents the question of whether the word "sue" as used in the Credit Repair Organization Act ("CROA") means "arbitrate." Or, perhaps the question is, as Alice

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[11] *Id.*

[12] 9 U.S.C. §§ 2,3.

[13] *Greenwood*, 615 F.3d at 1210.

[14] *Id.* Because neither the district court, nor the Ninth Circuit, reached the issue of whether CompuCredit was a credit repair organization subject to CROA, plaintiffs mere allegation of a CROA claim was sufficient for the Ninth Circuit to overcome Congress' strong policy favoring arbitration as expressed in the FAA. *Id.* at 1208 n. 3.

> put it: "whether you can make words mean many different things?[15]

The court's errant holding necessarily followed: "We conclude that Congress meant what it said in using the term "sue," and that it did not mean "arbitrate."[16]

The Ninth Circuit's decision represents the very "judicial hostility to arbitration agreements" that the FAA was intended to reverse.[17] To avoid a result that both the Ninth Circuit and the district court characterized as "unhealthy"[18] – the compelled arbitration of the plaintiffs' claims – the Ninth Circuit undermined the Congressional policy favoring arbitration, ignored this Court's prior decisions interpreting the FAA, and misinterpreted the language of CROA to create a new rule for courts in the Ninth Circuit: courts are the exclusive forum for consumers' CROA claims.

B. CROA Does Not Prohibit Binding Arbitration Agreements.

This Court has explained that, to avoid compelled arbitration, the opponent must demonstrate that "Congress intended to preclude a waiver of judicial

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[15] *Id.* at 1205 (citing Lewis Carroll's *Through the Looking Glass and What Alice Found There*).

[16] *Id.*

[17] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987).

[18] *Greenwood*, 615 F.3d at 1211.

remedies for the statutory rights at issue."[19] That intent must be "deducible" from the text of the statute, the legislative history, or from an inherent conflict between arbitration and the statute's underlying purpose.[20]

Having concluded that the "plain language of the CROA prohibits enforcement of the arbitration agreement," the Ninth Circuit did not consider CROA's legislative history.[21] The "plain language" relied upon by the court was a single sentence found in the middle of a lengthy consumer notice required by CROA that is entitled "Consumer Credit File Rights Under State and Federal Law."[22] The relevant sentence informs consumers that: "You have a right to sue a credit repair organization that violates the Credit Repair Organizations Act."[23] The court's decision converts this notice language into a substantive "right" under CROA.[24] The court then adds its own gloss: courts are the exclusive forum for the exercise of the consumer's "right to sue" because CROA's anti-waiver provision prohibits the waiver of any consumer protection or "right" provided by CROA.[25] For the

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[19] *McMahon*, 482 U.S. at 226-227.

[20] *Id.*

[21] *Greenwood*, 615 F.3d at 1211 n. 4.

[22] *See*, 15 U.S.C. § 1679c.

[23] 15 U.S.C. § 1679c(a).

[24] *Greenwood*, 615 F.3d at 1210.

[25] *Id.* at 1209 ("The plain meaning of the 'right to sue' thus clearly involves the right to bring an action in a court of law.").

Ninth Circuit, such a waiver occurs if a written arbitration agreement is enforced in a lawsuit involving a consumer's CROA claim.[26]

CROA's plain language contradicts, rather than supports, the Ninth Circuit's decision. CROA's anti-waiver statute provides, in part, that:

> Any waiver by any consumer of any protection provided by or *any right of the consumer* under this title –
>
> (1) *shall be treated as void*; and
>
> (2) may not be enforced by any Federal or State court *or any other person*.[27]

The language of the anti-waiver provision (*i.e.*, "or any other person") demonstrates that courts are not the *exclusive* forum for a consumer's CROA claim because a person *other than* a Federal or State court – perhaps an arbitrator – may be called upon to consider the enforceability of an agreement under CROA's anti-waiver provision, such as an agreement to arbitrate disputes. At a minimum, the "any other person" language of the anti-waiver provision was "sufficient to create a doubt as to the scope of the

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[26] *Id.* at 1210 ("The extremely broad anti-waiver provision in the CROA protects the enumerated 'right to sue' by treating as 'void [a]ny waiver by any consumer of any protection provided or *any right* of the consumer under [CROA].") (emphasis in original).

[27] 15 U.S.C. § 1679f(a).

arbitrable issue that this Court requires be resolved *in favor of*, and not against, arbitration.[28]

By reading the language of CROA's required consumer *notice* into the language of CROA's anti-waiver provision, the Ninth Circuit found a Congressional "proclamation" – where none exists – that CROA prohibits arbitration.[29] In doing so, the Ninth Circuit acknowledged its creation of a conflict with two sister circuits, the Third Circuit Court of Appeals ("Third Circuit")[30] and the Eleventh Circuit Court of Appeals ("Eleventh Circuit").[31] According to the Ninth Circuit, her sister circuits' decisions were unpersuasive because they "give surprisingly little regard to the 'right to sue' language" in CROA.[32]

CROA provides a mechanism by which consumers may recover from credit repair organizations that violate CROA, a mechanism found in CROA's civil liability provision, not in the consumer notice provision.[33] Admittedly, the civil liability provision contemplates that a consumer may bring a CROA claim in a

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[28] *See, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp*, 460, U.S. 1, 24-25 (1983).

[29] *Greenwood*, 615 F.3d at 1211.

[30] *Gay v. CreditInform*, 511 F.3d 369 (3rd Cir. 2007).

[31] *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009).

[32] *Greenwood*, 615 F.3d at 1211.

[33] *Compare* 15 U.S.C. § 1679c(a) *with* § 1679g(a).

court.[34] It does not, however, make courts the *exclusive* forum in which CROA claims may be brought.[35] Because CROA's actual language does not prohibit arbitration or make courts the exclusive forum for such claims. As a consequence, the Third and Eleventh Circuits had little trouble concluding that CROA's anti-waiver provision does not prohibit the enforcement of arbitration agreements.[36]

Rather than give effect to the strong Congressional policy favoring arbitration by following this Court's admonition that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," the Ninth Circuit turned the requirement on its head, concluding that to enforce an arbitration agreement under such circumstances, "strikes the court as embracing an *unhealthy* regard for the policy favoring arbitration."[37]

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[34] 15 U.S.C. § 1679g(a)(2)&(b) (describing the court's discretion to award punitive damages and the factors a court may consider when making such an award).

[35] *See*, 15 U.S.C. § 1679g(a)(1).

[36] *Picard*, 564 F.3d at 1255; *Gay*, 511 F.3d at 381-382.

[37] *Greenwood*, 615 F.3d at 1211 (emphasis in original); *see also, Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25 ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

C. The Ninth Circuit's Judicial Hostility to Arbitration Will Result in the Unnecessary Expenditure of Litigant and Judicial Resources.

Many CDIA members provide their credit-related products and services throughout the United States. These members know from experience that plaintiffs' class action attorneys will shop for, and file their complaints in, those district courts that they perceive to be most friendly to their claims. Because of the Ninth Circuit's interpretation of CROA's anti-waiver provision, district courts in the Ninth Circuit will be selected for the filing of any claim against any provider of credit-related products and services that has an arbitration provision in its agreement with a consumer. For the Ninth Circuit, it is irrelevant whether or not the defendant is actually a credit repair organization.[38] The mere allegation of a CROA claim is sufficient to defeat a motion to compel arbitration.

Presumably, under the Ninth Circuit's approach to the enforcement of arbitration agreements, discovery could reveal facts upon which a defendant could rely in a summary judgment motion to establish that it is not a credit repair organization. In such circumstances, CROA's anti-waiver provision, as interpreted

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[38] *Greenwood*, 615 F.3d at 1208 n. 3 (acknowledging that the issue of whether CompuCredit is actually a credit repair organization subject to CROA's anti-waiver provision was never reached).

by the Ninth Circuit, could not possibly apply to the parties' arbitration agreement because the court held that a consumer's "right to sue" exclusively in a court is found in the consumer notice provision.[39]

Under the Ninth Circuit's approach, if summary judgment were granted to a defendant on a plaintiff's CROA claim because the defendant established that it was not a credit repair organization, the district court that previously denied a defendant's motion to compel arbitration would, under the FAA, have to stay proceedings and compel the arbitration of the consumer's remaining claims at some distant future point in the litigation, perhaps after the close of discovery and shortly before trial. Such an approach is demonstrably at odds with the Congressional policy favoring arbitration set forth in the FAA.

Defendants should not be forced to participate in discovery and the preparation of dispositive motions to compel arbitration under the FAA simply because a plaintiff elects a district court in the Ninth Circuit to file a complaint alleging CROA claims when the parties' written agreement to arbitrate is clear and unambiguous. Such an expenditure of time and resources by the parties and the courts negates the efficiencies that make the arbitration process an attractive alternative to court-based litigation.

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[39] 15 U.S.C. § 1679c ("You have the right to sue a *credit repair organization* that violates the Credit Repair Organizations Act.") (emphasis added).

Reversing "judicial hostility to arbitration agreements" was the purpose underlying the FAA.[40] This Court should review and correct the Ninth Circuit's decision to eliminate this hostility in the courts of the Ninth Circuit and to remove the incentive for plaintiffs to forum shop and allege CROA claims in order to avoid the consequences of their written agreement to arbitrate their disputes.

II. THE NINTH CIRCUIT'S DECISION HARMS THE VERY CONSUMERS CROA WAS INTENDED TO PROTECT.

To provide consumers with the tools to protect themselves from the credit-related harm caused by credit fraud and identity theft, Congress amended the Fair Credit Reporting Act ("FCRA") in 2003 to permit consumers to place fraud alerts in their consumer reporting agency files,[41] block the reporting of information resulting from identity theft,[42] and require consumer reporting agencies to provide a summary of identity theft victim rights to consumers who report identity theft.[43]

The value and efficacy of these consumer protection tools depends upon the consumer's ability to obtain and understand credit-related information.

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[40] *McMahon*, 482 U.S. at 225.

[41] 15 U.S.C. § 1681c-1.

[42] 15 U.S.C. § 1681c-2.

[43] 15 U.S.C. § 1681g(c).

Making this information available to consumers or even proactively informing consumers when a review of their consumer report file could be beneficial, is a role being filled by the private sector through the provision of credit-information products, including credit monitoring.

The Federal Trade Commission, which enforces CROA and the FCRA, explained that, as consumer financial literacy improves, consumers have begun to recognize the importance of consumer report information, and private sector providers have responded by making credit monitoring and related products and services available to consumers.[4] Today, there are dozens of such providers. Their products can include: (1) one or more periodically updated credit scores; (2) consumer reports throughout the year; (3) identity theft prevention materials; (4) periodic email, telephone, or mail updates concerning consumer report file activity; (5) access to proprietary credit education materials; and (6) a central location providing links to governmental and industry websites providing additional credit-related information.

The businesses providing consumers with credit-related products and services are able to charge affordable prices, in part, because arbitration agreements permit them to predictably manage their litigation costs for any disputes related to their products and services. If, as the Ninth Circuit has

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[4] FTC, *Report to Congress* at 76-77.

held, the mere allegation of a CROA claim is sufficient to void an arbitration agreement, the availability of credit information products and services may be drastically reduced or even eliminated. It will almost certainly be more expensive for consumers.

CDIA submits that, properly read, CROA's consumer notice and anti-waiver provisions should not be interpreted in a way that will harm consumers by voiding arbitration agreements with the result that the credit-related products and services relied upon by consumers will be eliminated or their cost vastly increased.

CONCLUSION

For the reasons set forth above, CompuCredit's petition for writ of *certiorari* should be granted to permit this Court to review and correct the Ninth Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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In the Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
PETITIONERS

v.

WANDA GREENWOOD, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are subject to arbitration pursuant to an otherwise valid arbitration agreement.

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I. **Congress has expressed a strong federal policy in favor of arbitration, and that policy is reflected in the settled expectations of both businesses and consumers.** 5

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Under the Federal Arbitration Act, an agreement to arbitrate is enforceable just like any other contract. This is no less true of agreements to arbitrate *statutory* claims, except where Congress has demonstrated otherwise. These important principles—repeatedly underscored by this Court's decisions—are the basis for the settled expectations of countless businesses and individuals who have incorporated arbitration clauses into their commercial agreements.

The decision below strikes a blow against those settled expectations. Over a forceful dissent, a panel of the Ninth Circuit has declined to enforce an arbitration agreement despite the absence of any specific indication that Congress intended to preclude arbitration of the statutory claim at issue. In so holding, the court not only created a square and acknowledged circuit split (see Pet. 10-14), but also followed an approach that undermines the predictability and clarity that are the focus of this Court's decisions and the Federal Arbitration Act itself.

As discussed below, the importance of this Court's review here is highlighted by the extensive use of arbitration agreements in U.S. commerce. See *infra* at 5-9. Many of these agreements are jeopardized by

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than DRI, its members, and its counsel made any financial contribution to the brief's preparation or submission. After receiving notice of DRI's intention to file, the parties consented to the submission of this brief. Letters of consent from both parties are on file with the Clerk.

the decision below, which would make arbitration agreements unenforceable for statutory claims where the statute merely (1) creates a private right of action and (2) provides that rights granted by the statute may not be waived. Based on those characteristics, the Ninth Circuit interpreted the Credit Repair Organizations Act ("CROA") to give plaintiffs a nonwaivable right to sue *in court*. Under that theory, however, *any* statute creating a private right of action and containing a nonwaiver provision can be interpreted as trumping an agreement to arbitrate—and there are many such statutes. *E.g.*, 15 U.S.C. §§ 3611, 3614 (Housing and Community Development Act of 1980's private right of action and nonwaiver provisions); 29 U.S.C. §§ 1854, 1856 (Migrant and Seasonal Agricultural Worker Protection Act's private right of action and nonwaiver provisions); 40 U.S.C. § 3133 (putting conditions on a "waiver of the right to bring a civil action on a payment bond," including prohibiting pre-performance waivers). The majority decision thus threatens to throw a significant number of contracts, in several contexts, into turmoil.

As we will show (at 9-17), this turmoil is wholly unnecessary and unwarranted in light of this Court's previous decisions. Given Congress's clear direction in the Federal Arbitration Act ("FAA"), this Court has repeatedly enforced arbitration agreements in the face of statutory reservations of rights far clearer than the one here—including statutes that reserve the right to bring "'a civil action *in any court* of competent jurisdiction.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (emphasis added) (interpreting 29 U.S.C. § 626(c)(1)). In light of Congress's policy judgment favoring arbitration, along

with the CROA's *silence* on that issue, the Ninth Circuit contravened this Court's precedents in holding the arbitration provision here unenforceable. Moreover, the Ninth Circuit adopted an approach that creates doubt about how courts should resolve the question of arbitrability for statutory claims more broadly.

DRI submits this brief to discuss this important issue from the perspective of civil defense lawyers and the clients they represent. DRI is an international organization of attorneys defending the interests of businesses and individuals in civil litigation. DRI frequently participates as an *amicus curiae* in this Court and elsewhere in cases of interest to its membership. Arbitration agreements are of great importance to the business dealings of many of DRI's members and clients. This Court's review is urgently needed to ensure that these clients will continue to receive the benefits of their bargains when the claim at issue arises from a statute that evinces no congressional intent to preclude arbitration.

STATEMENT

Petitioners market and service a credit card called Aspire Visa. Pet. App. 3a. When consumers apply for this card, they agree to arbitrate "[a]ny claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to" their credit card accounts. *Id.* at 5a.

In 2008, a group of cardholders brought an action in the district court alleging, among other things, violations of the CROA. Petitioners moved to compel arbitration of these claims pursuant to the parties' agreements. The district court denied the motion, holding that the plain text of the CROA grants con-

sumers the "right to sue" and provides that this right cannot be waived. *Id.* at 45a.

The Ninth Circuit affirmed. Like the district court, it relied on the CROA's disclosure provisions, which require credit repair organizations to inform consumers of their "'right to sue.'" Pet. App. 9a (quoting 15 U.S.C. § 1679c(a)). Also like the district court, the Ninth Circuit relied on the CROA's statement that "'[a]ny waiver by any consumer of any protection * * * or any right'" is void. *Ibid.* (quoting 15 U.S.C. § 1679f(a)). As Petitioner has shown, the Ninth Circuit's decision creates a sharp and acknowledged split of authority with the Third and Eleventh Circuits, both of which have held that claims under the CROA may be subject to mandatory arbitration. Pet. 10-14; see also Pet. App. 17a (majority noting, "[w]e realize this decision is in conflict with that of two of our sister circuits").

Judge Tashima dissented, emphasizing that the CROA's disclosure provisions do not create any substantive rights but depend for their content on separate, substantive provisions. Pet. App. 25a. In particular, the right to sue is created by 15 U.S.C. § 1679g, which provides that "[a]ny person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person." As Judge Tashima noted, however, "[n]owhere in the CROA * * * does Congress mandate a judicial forum for enforcement of the CROA's substantive provisions." Pet. App. at 26a. Moreover, the "'right to sue' does not necessarily mean the right to sue *in court*." *Id.* at 27a (emphasis in original). As he concluded: "We should not lightly create a circuit split on an issue of national application on the basis

of the flimsy evidence on which the majority relies." *Id.* at 27a-28a.

REASONS FOR GRANTING THE PETITION

I. Congress has expressed a strong federal policy in favor of arbitration, and that policy is reflected in the settled expectations of both businesses and consumers.

Under the FAA, "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. With this forceful endorsement from Congress, arbitration has become central to a wide range of commercial agreements. Indeed, "[t]he preeminent concern of Congress in passing the [Federal Arbitration Act in 1925] was to enforce private agreements." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). For this reason, it is well settled that "questions of arbitrability * * * be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Arbitration is widely used in commercial contracts—including, as here, in contracts related to debt collection and credit. One recent study, for example, considers cases filed with the National Arbitration Forum in just over four years between 2003 and 2007. In that time, the Forum entertained 33,948 arbitrations. Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration* 2 (2008). All but 15 of these were "collections" cases, in which the consumer typically owes the debt. *Ibid.* Thus, this figure does not even include *consumer-initiated* lawsuits, such as the one at issue here.

Contracts *between* businesses likewise rely heavily on arbitration. For example, a study of franchise agreements found that nearly half of the sample contained an arbitration clause. This number has remained steady for nearly ten years. Christopher R. Drahozal & Quentin R. Whittrock, *Is There a Flight from Arbitration?*, 37 Hofstra L. Rev. 71, 75 (2008). So too in other industries. A leading securities arbitration forum, for example, has seen over 4,614 arbitrations filed each year since 1996—with over 7,000 filed annually in 2002, 2003, 2004, and 2009. *FINRA Dispute Resolution Statistics* (January 2011).

Nor is the prevalence of arbitration a sign of any inequity. To the contrary, arbitration is favored because it is widely perceived as fair, while at the same time cheaper and faster than traditional in-court litigation. According to a study prepared by Ernst & Young LLP, consumers prevailed in 55 percent of the consumer-initiated cases that reached decision. Cole & Frank, *supra*, at 3 (citing Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004)). Another study found that consumers prevailed in consumer-initiated cases 65.5 percent of the time. *Ibid.* (citing Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, Metropolitan Corporate Counsel 32 (July 2006)). Still another study found that in collections cases, consumers won reductions of the award in 37.4 percent of cases that went to hearing. *Id.* at 3. Moreover, in over 20 percent of the cases in which the consumer defaulted, the arbitrator refused to award the entire amount of the claim. *Ibid.*

There can be no question that arbitration allows parties to resolve disputes more quickly than through

extensive court proceedings. According to government statistics, the median time from filing to disposition of civil cases in the twelve-month period ending March 31, 2010, was 23.3 months for cases disposed of by trial, and 8.2 months overall. Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics: March 31, 2010*, Table C-5 (2010). By contrast, according to a study of 301 consumer arbitrations administered by the American Arbitration Association, the average time from filing to final award was 6.9 months—an improvement of nearly 20 percent over court cases resolved without trial, and a 70 percent improvement over those that are tried. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 845 (2010). Other advantages of arbitration include lower costs, greater adjudicator expertise, potentially greater confidentiality, and potentially less acrimony. See generally Randall Thomas et al., *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 Vand. L. Rev. 959, 970-973 (2010) (summarizing reasons parties might prefer to arbitrate); accord 1 Domke on Commercial Arbitration § 1:4 (3d ed. 2010) (discussing the pros and cons of arbitration).

Arbitration also plays a significant role in employment disputes, as many of this Court's previous decisions have recognized. Among other advantages, arbitration gives both employees and employers an opportunity to resolve relatively small claims in a cost-effective way. Lewis L. Maltby, *Employment Arbitration & Workplace Justice*, 38 U.S.F. L. Rev. 105, 106-107 (2003). According to one study, 26 percent of AAA employment arbitrations in 2000 involved

claims of less than $25,000. *Id.* at 117. Further, from the employee's perspective, an arbitration may offer greater access to merits hearings, as relatively few cases in arbitration are resolved on summary judgment. *Id.* at 113.

One study of 551 employment contracts for Chief Executive Officers found that *half* contained an arbitration clause. When the sample was broken down by year, the study revealed that, but for a small dip in 2004, arbitration clauses had become more common every year since 1999, appearing in 60.4% of contracts by 2005. Thomas et al., *supra*, at 981. A CEO candidate, of course, is likely in a strong bargaining position relative to the business. But these candidates nevertheless often conclude that arbitration provisions are in their interest.

Given the importance of arbitration in modern commercial contracts—and Congress's longstanding policy of respecting and enforcing agreements to arbitrate—this Court has consistently required parties seeking to invalidate their agreements to show that Congress specifically intended to preclude arbitration of the particular claim at issue. *E.g.*, *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79, 90 (2000).

As discussed below, the Ninth Circuit's decision here gives short shrift to this important federal policy and the resulting expectation that agreements to arbitrate will be enforced. The Ninth Circuit found that claims under the CROA may not be subjected to mandatory arbitration under a private law arrangement, even though Congress did not mention arbitration at all when it enacted the CROA. The court based its decision merely on the fact that the CROA confers a private right of action and provides

that rights granted by the statute may not be waived. As discussed below, this approach to arbitrability not only threatens thousands of arbitration agreements; it is flatly contrary to the pro-arbitration policy embodied in the FAA and this Court's previous decisions.

II. The decision below interprets the CROA in a manner inconsistent with its own plain language and this Court's approach to similar statutes.

As this Court has recognized, "having made the bargain to arbitrate, [a] party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). "[T]he burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Ibid.*

The Ninth Circuit did not hold Respondents, Plaintiffs below, to that burden. Accordingly, the decision below stands in conflict both with this Court's approach to arbitrating statutory claims in general and with the decisions of the two federal courts of appeals that have considered arbitration under the CROA in particular. The Petition describes in detail the conflict among the Circuits (at 10-14); the discussion below focuses on the Ninth Circuit's approach to the CROA and compares it with this Court's approach to other statutes having similar characteristics.

1. By its plain terms, the CROA does not require that consumers be told they have a right to a *judicial* forum—only that they "have a *right to sue* a credit repair organization that violates the Credit Repair

Organization Act." 15 U.S.C. § 1679c(a) (emphasis added). The Ninth Circuit interpreted the "right to sue" language here by way of a three-step journey through *Black's Law Dictionary*, from "sue" to "lawsuit" to "suit." See Pet. App. 10a. For at least four independent reasons, this analysis was fundamentally misdirected.

First, as discussed at length in the Petition, the "right to sue" language is the wrong starting point. The disclosure provisions of the CROA do not themselves create any substantive rights; they merely incorporate the substantive rights conferred elsewhere in the statute. For present purposes, the relevant substantive provision is the civil liability provision, which states that "[a]ny person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person." 15 U.S.C. § 1679(g). The statute nowhere precludes credit repair organizations from also telling consumers that, if they wish to form a contract, any such "lia[bility]" must be resolved through arbitration.

Second, even if the "right to sue" language were itself significant, the *contracts themselves* defined the forum for exercising that "right to sue"—that is, in arbitration. Whatever "sue" may mean in a legal dictionary, the consumers who signed the contracts at issue here necessarily agreed that the term referred to arbitration. The CROA nowhere prohibits contracting parties from making such an agreement. Congress's silence in the CROA on this critical point—in the face of the FAA's nearly century-old command that arbitration agreements must be enforced—is indeed "the dog that did not bark." Pet. 22 (quoting *Chisom* v. *Roemer*, 501 U.S. 380, 396 n.23 (1991)). *Cf. Bruesewitz* v. *Wyeth LLC*, No. 09-152, at

8, 562 U.S. ___ (2011) (slip op.) (explaining that a statute's failure to mention a "classic and well known" basis for liability must be a matter of "deliberate choice, not inadvertence") (citation omitted). Given the crystal clear language of the FAA, the arbitration clauses must be enforced as written.

Third, even if "right to sue" could be read in isolation from the arbitration provision in these contracts (and it cannot), the words must be given their common, everyday meaning. *E.g.*, *Hamilton* v. *Lanning*, 130 S. Ct. 2464, 2471 (2010) ("When terms used in a statute are undefined, we give them their ordinary meaning.") (internal quotation marks and citation omitted). In determining *that* meaning, mainstream dictionaries are much more helpful than legal dictionaries—defining "sue" as "to seek justice or right from (a person) by legal process." *Webster's Ninth New Collegiate Dictionary* 1179 (1988); see also *Funk & Wagnalls Standard College Dictionary* 1338 (1973) ("To institute proceedings against for the recovery of some right or the redress of some wrong"); *Shorter Oxford English Dictionary* 3095 (6th ed. 2007) ("Institute a suit for, make a legal claim to"); *Random House Webster's Unabridged Dictionary* 1900 (2d ed. 2001) ("[T]o institute a process in law against; bring a civil action against"). Arbitration is undeniably a "legal process"; it is used to vindicate legal rights, and its awards are enforceable by law. Read in this commonsense way, the guarantee of a right to sue in no way limits the forum available. See Pet. App. 27a ("the mere mention of a "right to sue" does not necessarily mean the right to sue *in court*") (Tashima, J., dissenting) (emphasis in original); *Picard* v. *Credit Solutions, Inc.*, 564 F.3d 1249, 1255 (11th Cir. 2009) ("Although CROA requires credit repair organiza-

tions to inform consumers of their right to a private cause of action, such does not preclude arbitration under CROA."); *Gay* v. *CreditInform*, 511 F.3d 369, 377 n.4 (3d Cir. 2009) (noting that "the section does not specify the forum for the resolution of the dispute").

Fourth, even if "right to sue" is read in isolation and interpreted in a technical sense as the right to bring a legal action in court, that still does not foreclose the corresponding right of the party sued to raise affirmative defenses—such as an agreement to arbitrate. As the Third Circuit noted, "even if the use of the word 'sue' implies the availability of a judicial forum for an action against a credit repair organization, use of the word would not mean that the organization could not assert defenses that it had to such an action including the right to invoke a contractual arbitration provision to change the forum." *Gay*, 511 F.3d at 377 n.4. Thus, even assuming that Respondents had a right to sue in court, they have done so—which is the very reason that their case is and will remain in federal court, even as the merits of the dispute are sent to arbitration. See 9 U.S.C. § 3 (providing for "stay"—not dismissal—of proceedings in federal district courts when an issue in the proceeding is referable to arbitration). The mere fact that they had the ability to *file their lawsuit* in federal court does not mean that they cannot be held to their agreement to *resolve the merits of the liability* in arbitration. Yet the Ninth Circuit's reading of "right to sue" went well beyond the ability to file suit in court, further eviscerating the FAA's explicit protections of the right to arbitrate.

2. This conclusion is compelled by this Court's precedents, which have enforced arbitration agree-

ments in the face of statutes that refer far more explicitly to court actions. *E.g.*, *Gilmer*, 500 U.S. at 29. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Thus, although the CROA creates a private right of action, claims based on such statutory rights of action *are* subject to arbitration.

This is a matter of common sense, as well as legal precedent. Whenever Congress creates a private right of action, it necessarily contemplates that the party may proceed in court. See *Gay*, 511 F.3d at 383 n.10 (stating that "the rights to judicial forums and class action resolution of disputes exist outside of [CROA]"). Thus, it would be redundant for a statute creating a cause of action to add, "in court." That is assumed. But as this Court has repeatedly made clear, Congress's creation of a statutory right of action in court does not preclude enforcement of agreements to resolve those rights in arbitration.

For example, the ADEA provides that "[a]ny person aggrieved may bring a civil action *in any court* of competent jurisdiction." 29 U.S.C. § 626(c)(1) (emphasis added). Far from precluding arbitration, this Court held this provision fully consistent with arbitration, because "provision[s] for concurrent jurisdiction[] serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes." *Gilmer*, 500 U.S. at 29 (internal quotation marks and citation omitted) (second brackets in original). The CROA—which grants a private right of action but does not contain such direct language specifying where the action may be brought—is consistent with arbitration for the same reason. And

because the statute in *Gilmer* referred not merely to a "right to sue" but to a right to bring a civil action "in any court," this is an *a fortiori* case under *Gilmer*. See also *Rodriguez de Quijas* v. *Shearson/American Express Inc.*, 490 U.S. 477, 482 (1989) (statute provided for "broad venue provisions in the federal courts" and "concurrent jurisdiction in the state and federal courts"); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987) (statute vested "exclusive jurisdiction" in the "district courts of the United States"); 15 U.S.C. § 15(a) ("any person who shall be injured in his business or property * * * may sue therefor in any district court of the United States"); *id.* § 1640(e) ("[a]ny action under this section may be brought in any United States district court"). Moreover, since Congress enacted the CROA in 1996, after many of these decisions, it is deemed to know how such language would be interpreted. *Cf. South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) ("Congress is aware of existing law when it passes legislation.").

Because there is no unqualified right to a judicial forum in the CROA, that statute's nonwaiver provision has no application here. See 15 U.S.C. § 1679f(a) (providing that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer *under this subchapter*" is void) (emphasis added). To trump the FAA, Congress must affirmatively intend to preclude arbitration, and there is no evidence that Congress so much as considered precluding arbitration here. As discussed above, the only right provided by the CROA relevant here is the right to receive a contract offer stating that the consumer has the right to sue. The statute does not prohibit covered parties from *defining* that right as satisfied by arbitration.

And for that reason, none of the Respondents' rights here were waived by arbitration.

For similar reasons, this Court has declined to void arbitration agreements despite the presence of nonwaiver provisions in other statutes. In *McMahon*, for example, the statute at issue (the Securities Exchange Act of 1934) provided as follows: "The district courts of the United States * * * shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa. Yet this Court upheld an agreement to arbitrate claims under the Act, *despite* a provision that declared void "'[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act].'" *McMahon*, 482 U.S. at 227 (brackets in original) (quoting 15 U.S.C. § 78cc(a)). Likewise, in *Rodriguez de Quijas*, the Court upheld such an agreement despite identical language in the Securities Act. *Id.* at 485. As the Court explained, the nonwaiver provision applied only to the substantive obligations imposed by the statutes, not to procedural provisions such as the right to a judicial forum. *Rodriguez de Quijas*, 490 U.S. at 482; *McMahon*, 482 U.S. at 228.

So too here. Like the nonwaiver provisions at issue in *McMahon* and *Rodriguez*, the CROA's nonwaiver provision appears in a provision guarding against "[n]oncompliance with this subchapter." 15 U.S.C. § 1679f. As in those cases, Congress here meant only to protect the substantive rights unique to the CROA. And those substantive rights do not include the unqualified right to litigate in court.

The majority below failed to distinguish these cases. It reasoned that the language of the CROA, prohibiting the waiver of "any protection" or "any right," was much broader than that of the 1934 Securities Exchange Act, which prohibited the waiver of noncompliance. Pet. App. 19a. But again, a nonwaiver provision cannot prevent waiver of rights that do not exist. And here, such protections and rights simply do not include the unqualified right to litigate in court. A right to sue, if it exists, is simply a right to seek redress in some forum. Here, that right will be fully vindicated in arbitration.

3. As this discussion shows, the Ninth Circuit has done more here than simply interpret the CROA. It has adopted an approach to arbitration of statutory claims that conflicts with how this Court has approached that same question in other contexts. Indeed, it is not uncommon for statutes to have both of the characteristics that the Ninth Circuit recognized in the CROA—an express private right of action and a nonwaiver provision. *E.g.*, 15 U.S.C. §§ 3611, 3614 (Housing and Community Development Act of 1980's private right of action and nonwaiver provisions); 29 U.S.C. §§ 1854, 1856 (Migrant and Seasonal Agricultural Worker Protection Act's private right of action and nonwaiver provisions); 40 U.S.C. § 3133 (putting conditions on a "waiver of the right to bring a civil action on a payment bond," including prohibiting pre-performance waivers). In the interest of promoting predictability in commercial contracts, this Court should intervene now to address the problems with the Ninth Circuit's statutory approach, rather than waiting for the same problem to arise for other statutes as well.

CONCLUSION

Since Congress enacted the FAA in 1925, this Court has repeatedly guarded the right to arbitration against encroachments by particular state and federal courts that have regarded the right with more skepticism. This Court's jurisprudence on this issue is consistent with—and has fostered—the common expectation that commercial contracts will be enforced according to their terms. The decision below undermines that expectation. It creates not only a split with the Third and Eleventh Circuits, but also doubt about how courts should resolve the question of arbitrability of statutory claims in general. *Amicus* DRI urges this Court to grant review to resolve the conflict and to ensure the courts' fidelity to Congress's longstanding policy favoring arbitration.

Respectfully submitted.

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FEBRUARY 2011

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 10-948

IN THE

Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
Petitioners,

v.

WANDA GREENWOOD *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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APPENDIX A

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

United States District Court for the Northern District of California

No. 4:08-cv-04878-CW

Filed	#	Docket Text
10/24/2008	1	COMPLAINT; jury demand against Compucredit Corporation, Columbus Bank and Trust (Filing fee $ 350, receipt number 34611024789.). Filed by Wanda Greenwood. (cp, COURT STAFF) (Filed on 10/24/2008) (Entered: 10/29/2008)
10/24/2008	2	Summons Issued as to Compucredit Corporation, Columbus Bank and Trust. (cp, COURT STAFF) (Filed on 10/24/2008) (Entered: 10/29/2008)
10/24/2008	3	Certificate of Interested Entities by Wanda Greenwood (cp, COURT STAFF) (Filed on 10/24/2008) (Entered: 10/29/2008)
10/24/2008	4	ADR SCHEDULING ORDER: Case Management Statement due by 1/27/2009. Case Management Conference set for 2/3/2009 02:00

Filed	#	Docket Text
		PM. (Attachments: # 1 Standing Order) (cp, COURT STAFF) (Filed on 10/24/2008) (Entered: 10/29/2008)
10/24/2008		CASE DESIGNATED for Electronic Filing. (cp, COURT STAFF) (Filed on 10/24/2008) (Entered: 10/29/2008)
11/06/2008	5	FIRST AMENDED COMPLAINT; Jury Demand against all defendants. Filed byWanda Greenwood. (Traktman, Laurie) (Filed on 11/6/2008) Modified on 11/7/2008 (cp, COURT STAFF). (Entered: 11/06/2008)
11/19/2008	6	MOTION for leave to appear in Pro Hac Vice - Steven A. Martino (Filing fee $ 210, receipt number 44611002846.) filed by Wanda Greenwood. (cp, COURT STAFF) (Filed on 11/19/2008) (Entered: 11/19/2008)
11/19/2008	7	MOTION for leave to appear in Pro Hac Vice - W. Lloyd Copeland (Filing fee $ 210, receipt number 44611002847.) filed by Wanda Greenwood. (cp, COURT STAFF) (Filed on 11/19/2008) (Entered: 11/19/2008)
11/19/2008	8	MOTION for leave to appear in Pro Hac Vice - Kasie M. Braswell

Filed	#	Docket Text
		(Filing fee $ 210, receipt number 44611002848.) filed by Wanda Greenwood. (cp, COURT STAFF) (Filed on 11/19/2008) (Entered: 11/19/2008)
11/20/2008	9	ORDER by Judge Claudia Wilken granting 6 Motion for Pro Hac Vice - Steven A. Martino (cp, COURT STAFF) (Filed on 11/20/2008) (Entered: 11/21/2008)
11/20/2008	10	ORDER by Judge Claudia Wilken granting 7 Motion for Pro Hac Vice - W. Lloyd Copeland (cp, COURT STAFF) (Filed on 11/20/2008) (Entered: 11/21/2008)
11/20/2008	11	ORDER by Judge Claudia Wilken granting 8 Motion for Pro Hac Vice - Kasie M. Braswell (cp, COURT STAFF) (Filed on 11/20/2008) (Entered: 11/21/2008)
12/17/2008	12	STIPULATION *To Extend Time To Respond To Complaint* by Columbus Bank and Trust, Wanda Greenwood, Ladelle Hatfield, Deborah McCleese. (McGuire, James) (Filed on 12/17/2008) Modified on 12/18/2008 (cp, COURT STAFF). (Entered: 12/17/2008)
12/17/2008	13	CERTIFICATE OF SERVICE by Columbus Bank and Trust

Filed	#	Docket Text
		re 12 Stipulation *To Extend Time To Respond To Complaint* (McGuire, James) (Filed on 12/17/2008) (Entered: 12/17/2008)
12/18/2008	14	STIPULATION *Pursuant to Local Rule 6-1(a) to Extend Time for Compucredit to Respond to First Amended Complaint with Certificate of Service* by Compucredit Corporation. (Germaise, Susan) (Filed on 12/18/2008) (Entered: 12/18/2008)
12/18/2008	15	MOTION for leave to appear in Pro Hac Vice - Tim A. O'Brien (Filing fee $ 210, receipt number 44611002962.) filed by Columbus Bank and Trust. (cp, COURT STAFF) (Filed on 12/18/2008) (Entered: 12/22/2008)
12/29/2008	16	ORDER by Judge Claudia Wilken granting 15 Motion for Pro Hac Vice - Tim A. O'Brien (cp, COURT STAFF) (Filed on 12/29/2008) (Entered: 12/30/2008)
12/30/2008	17	MOTION to Compel *Arbitration* filed by Compucredit Corporation. Motion Hearing set for 2/26/2009 02:00 PM in Courtroom 2, 4th Floor, Oakland. (Germaise, Susan) (Filed on 12/30/2008) (Entered:

Filed	#	Docket Text
		12/30/2008)
12/30/2008	18	Declaration of Hima Amin in Support of 17 MOTION to Compel *Arbitration* filed by Compucredit Corporation. (Related document(s) 17) (Germaise, Susan) (Filed on 12/30/2008) (Entered: 12/30/2008)
12/30/2008	19	Declaration of Sandy Diaz in Support of 17 MOTION to Compel *Arbitration* filed by Compucredit Corporation. (Related document(s) 17) (Germaise, Susan) (Filed on 12/30/2008) (Entered: 12/30/2008)
12/30/2008	20	Declaration of Steve Hotz in Support of 17 MOTION to Compel *Arbitration* filed by Compucredit Corporation. (Related document(s) 17) (Germaise, Susan) (Filed on 12/30/2008) (Entered: 12/30/2008)
12/30/2008	21	Request for Judicial Notice filed by Compucredit Corporation. (Germaise, Susan) (Filed on 12/30/2008) (Entered: 12/30/2008)
12/30/2008	22	Declaration of Susan L. Germaise in Support of 21 Request for Judicial Notice filed by Compucredit Corporation. (Related document(s) 21) (Germaise, Susan)

Filed	#	Docket Text
		(Filed on 12/30/2008) (Entered: 12/30/2008)
12/30/2008	23	Proposed Order re 21 Request for Judicial Notice by Compucredit Corporation. (Germaise, Susan) (Filed on 12/30/2008) (Entered: 12/30/2008)
12/30/2008	24	Proposed Order re 17 MOTION to Compel *Arbitration* by Compucredit Corporation. (Germaise, Susan) (Filed on 12/30/2008) (Entered: 12/30/2008)
12/30/2008	25	MOTION for leave to appear in Pro Hac Vice - David L. Hartsell (Filing fee $210, receipt number 4611002990) filed by Compucredit Corporation. (kc, COURT STAFF) (Filed on 12/30/2008) (Entered: 12/31/2008)
01/06/2009	26	ORDER by Judge Claudia Wilken granting 25 Motion for Pro Hac Vice - David L. Hartsell (cp, COURT STAFF) (Filed on 1/6/2009) (Entered: 01/07/2009)
01/09/2009	27	MOTION to Compel; *Memorandum Of Points And Authorities in Support Thereof* filed by Columbus Bank and Trust. Motion Hearing set for 2/26/2009 02:00 PM in Courtroom 2, 4th Floor, Oakland.

Filed	#	Docket Text
		(Attachments: # 1 Proposed Order) (McGuire, James) (Filed on 1/9/2009) Modified on 2/6/2009 (cp, COURT STAFF). (Entered: 01/09/2009)
01/09/2009	28	NOTICE OF ERRATA by Compucredit Corporation re 17 MOTION to Compel *Arbitration* (Germaise, Susan) (Filed on 1/9/2009) Modified on 1/12/2009 (cp, COURT STAFF). (Entered: 01/09/2009)
01/13/2009	29	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (O'Brien, Tim) (Filed on 1/13/2009) (Entered: 01/13/2009)
01/13/2009	30	NOTICE of need for ADR Phone Conference (ADR L.R. 3-5 d) (Barnes, Adrian) (Filed on 1/13/2009) (Entered: 01/13/2009)
01/13/2009	31	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Barnes, Adrian) (Filed on 1/13/2009) (Entered: 01/13/2009)
01/13/2009	32	ADR Certification (ADR L.R. 3-5 b) of discussion of ADR options (Barnes, Adrian) (Filed on 1/13/2009) (Entered: 01/13/2009)
01/13/2009	33	Statement *Regarding ADR Certification* by Ladelle Hatfield. (Barnes, Adrian) (Filed on

Filed	#	Docket Text
		1/13/2009) (Entered: 01/13/2009)
01/14/2009	34	ERRATA re 18 Declaration in Support *Notice of Errata re Omission of Attestation re Signature of Hima Amin on Declaration Filed December 30, 2008 in Support of Compucredit Corporation's Motion to Compel Arbitration* by Compucredit Corporation. (Germaise, Susan) (Filed on 1/14/2009) (Entered: 01/14/2009)
01/14/2009	35	ERRATA re 19 Declaration in Support *Notice of Errata re Omission of Attestation re Signature of Sandy Diaz on Declaration Filed December 30, 2008 in Support of Compucredit Corporation's Motion to Compel Arbitration* by Compucredit Corporation. (Germaise, Susan) (Filed on 1/14/2009) (Entered: 01/14/2009)
01/14/2009	36	MOTION for Extension of Time to File *Rule 26(F) Planning Report, Joint Case Management Statement and Initial Case Management Conference* filed by Compucredit Corporation. (Attachments: # 1 Proposed Order Proposed Order Re Motion to Extend Time) (Germaise, Susan) (Filed on

Filed	#	Docket Text
		1/14/2009) (Entered: 01/14/2009)
01/14/2009	37	Declaration of Susan L. Germaise in Support of 36 MOTION for Extension of Time to File *Rule 26(F) Planning Report, Joint Case Management Statement and Initial Case Management Conference* filed by Compucredit Corporation. (Related document(s) 36) (Germaise, Susan) (Filed on 1/14/2009) Modified on 1/15/2009 (cp, COURT STAFF). (Entered: 01/14/2009)
01/16/2009	38	MOTION for leave to appear in Pro Hac Vice - Gregory H. Hawley (Filing fee $ 210, receipt number 44611003060.) filed by Ladelle Hatfield, Wanda Greenwood, Deborah McCleese. (cp, COURT STAFF) (Filed on 1/16/2009) (Entered: 01/20/2009)
01/16/2009	39	MOTION for leave to appear in Pro Hac Vice - Christopher J. Nicholson (Filing fee $ 210, receipt number 44611003059.) filed by Ladelle Hatfield, Wanda Greenwood, Deborah McCleese. (cp, COURT STAFF) (Filed on 1/16/2009) (Entered: 01/20/2009)
01/16/2009	40	MOTION for leave to appear in Pro Hac Vice - Richard R. Rosenthal (Filing fee $ 210, receipt

Filed	#	Docket Text
		number 44611003058.) filed by Ladelle Hatfield, Wanda Greenwood, Deborah McCleese. (cp, COURT STAFF) (Filed on 1/16/2009) (Entered: 01/20/2009)
01/21/2009	41	ADR Clerks Notice Setting ADR Phone Conference on 1/29/09 at 3:00 p.m. Please take note that plaintiff's counsel initiates the call to all parties. (tjs, COURT STAFF) (Filed on 1/21/2009) (Entered: 01/21/2009)
01/21/2009	43	ORDER by Judge Claudia Wilken granting 38 Motion for Pro Hac Vice - Gregory H. Hawley (cp, COURT STAFF) (Filed on 1/21/2009) (Entered: 01/22/2009)
01/21/2009	44	ORDER by Judge Claudia Wilken granting 39 Motion for Pro Hac Vice - Christopher J. Nicholson (cp, COURT STAFF) (Filed on 1/21/2009) (Entered: 01/22/2009)
01/21/2009	45	ORDER by Judge Claudia Wilken granting 40 Motion for Pro Hac Vice - Richard R. Rosenthal (cp, COURT STAFF) (Filed on 1/21/2009) (Entered: 01/22/2009)
01/22/2009	42	ORDER by Judge Claudia Wilken granting 36 MOTION for Extension of Time to File Rule 26(F) Planning Report, Joint Case

Filed	#	Docket Text
		Management Statement and Initial Case Management Conference. (scc, COURT STAFF) (Filed on 1/22/2009) (Entered: 01/22/2009)
01/29/2009		ADR Remark: ADR Phone Conference held by HAH on 1/29/09. (tjs, COURT STAFF) (Filed on 1/29/2009) (Entered: 02/03/2009)
02/05/2009	46	Memorandum in Opposition re 27 MOTION to Compel filed byLadelle Hatfield, Wanda Greenwood, Deborah McCleese. (Barnes, Adrian) (Filed on 2/5/2009) Modified on 2/6/2009 (cp, COURT STAFF). (Entered: 02/05/2009)
02/05/2009	47	DECLARATION of Kasie Braswell in support of 46 Memorandum in Opposition re 27 MOTION to Compel filed byLadelle Hatfield, Wanda Greenwood, Deborah McCleese. (Related document(s) 46) (Barnes, Adrian) (Filed on 2/5/2009) Modified on 2/6/2009 (cp, COURT STAFF). (Entered: 02/05/2009)
02/05/2009	48	DECLARATION of James L. Brown in support of re 46 Memorandum in Opposition re 27 MOTION to Compel filed

Filed	#	Docket Text
		byLadelle Hatfield, Wanda Greenwood, Deborah McCleese. (Related document(s) 46) (Barnes, Adrian) (Filed on 2/5/2009) Modified on 2/6/2009 (cp, COURT STAFF). (Entered: 02/05/2009)
02/05/2009	49	DECLARATION of Wanda Greenwood in support of re 46 Memorandum in Opposition re 27 MOTION to Compel filed byLadelle Hatfield, Wanda Greenwood, Deborah McCleese. (Related document(s) 46) (Barnes, Adrian) (Filed on 2/5/2009) Modified on 2/6/2009 (cp, COURT STAFF). (Entered: 02/05/2009)
02/05/2009	50	DECLARATION of Deborah McCleese in support of re 46 Memorandum in Opposition re 27 MOTION to Compel filed byLadelle Hatfield, Wanda Greenwood, Deborah McCleese. (Related document(s) 46) (Barnes, Adrian) (Filed on 2/5/2009) Modified on 2/6/2009 (cp, COURT STAFF). (Entered: 02/05/2009)
02/09/2009	51	MOTION for leave to appear in Pro Hac Vice - U.W. Clemon (Filing fee $ 210, receipt number 44611003151.) filed by Ladelle Hatfield, Wanda Greenwood, Deborah McCleese. (cp, COURT

Filed	#	Docket Text
		STAFF) (Filed on 2/9/2009) (Entered: 02/11/2009)
02/11/2009	52	ORDER by Judge Claudia Wilken granting 51 Motion for Pro Hac Vice - U.W. Clemon (cp, COURT STAFF) (Filed on 2/11/2009) (Entered: 02/12/2009)
02/12/2009	53	REPLY in Support re 17 MOTION to Compel *Arbitration* by Defendants Compucredit Corporation and Columbus Bank and Trust Company (Germaise, Susan) (Filed on 2/12/2009) Modified on 2/13/2009 (cp, COURT STAFF). (Entered: 02/12/2009)
02/12/2009	54	Evidentiary Objections to the Declaration of Kasie Braswell filed by Compucredit Corporation, Columbus Bank of Trust. (Germaise, Susan) (Filed on 2/12/2009) Modified on 2/13/2009 (cp, COURT STAFF). (Entered: 02/12/2009)
02/12/2009	55	Evidentiary Objections to the Declaration of James L.Brown filed by Compucredit Corporation, Columbus Bank and Trust. (Germaise, Susan) (Filed on 2/12/2009) Modified on 2/13/2009 (cp, COURT STAFF). Modified on 2/13/2009 (cp, COURT STAFF). (Entered: 02/12/2009)

Filed	#	Docket Text
02/12/2009	56	Evidentiary Objections to the Declaration of Wanda Greenwood filed by Compucredit Corporation, Columbus Bank and Trust. (Germaise, Susan) (Filed on 2/12/2009) Modified on 2/13/2009 (cp, COURT STAFF). Modified on 2/13/2009 (cp, COURT STAFF). (Entered: 02/12/2009)
02/12/2009	57	Evidentiary Objections to the Declaration of Deborah McCleese filed by Compucredit Corporation, Columbus Bank and Trust. (Germaise, Susan) (Filed on 2/12/2009) Modified on 2/13/2009 (cp, COURT STAFF). (Entered: 02/12/2009)
02/18/2009	58	NOTICE by Ladelle Hatfield, Wanda Greenwood, Deborah McCleese *Notice of Appearance of U.W. Clemon* (Barnes, Adrian) (Filed on 2/18/2009) (Entered: 02/18/2009)
02/23/2009	59	ERRATA re 21 Request for Judicial Notice *Filed in Support of Motion to Compel Arbitration* by Compucredit Corporation. (Germaise, Susan) (Filed on 2/23/2009) (Entered: 02/23/2009)
02/26/2009	60	Minute Entry: Motion Hearing held on 2/26/2009 before Claudia Wilken (Date Filed: 2/26/2009)

Filed	#	Docket Text
		re 27 MOTION to Compel filed by Columbus Bank and Trust, 17 MOTION to Compel *Arbitration* filed by Compucredit Corporation. Case Management Conference set for 4/14/2009 02:00 PM. (Court Reporter Raynee Mercado.) (scc, COURT STAFF) (Date Filed: 2/26/2009) (Entered: 03/05/2009)
03/18/2009	61	Joint MOTION for Extension of Time to File *Rule 26(f) Planning Report, Joint Case Management Statement and Initial Case Management Conference* filed by Compucredit Corporation, Compucredit Corporation. (Attachments: # 1 Proposed Order Proposed Order Extending Time for Filing of Rule 26(f) Planning Report, Joint Case Management Statement and Initial Case Management Conference) (Germaise, Susan) (Filed on 3/18/2009) Modified on 3/19/2009 (cp, COURT STAFF). (Entered: 03/18/2009)
03/18/2009	62	Declaration of Susan L. Germaise in Support of 61 Joint MOTION for Extension of Time to File *Rule 26(f) Planning Report, Joint Case Management Statement and Initial*

Filed	#	Docket Text
		Case Management Conference filed by Compucredit Corporation. (Related document(s) 61) (Germaise, Susan) (Filed on 3/18/2009) Modified on 3/19/2009 (cp, COURT STAFF). (Entered: 03/18/2009)
03/20/2009	63	ORDER by Judge Claudia Wilken granting 61 Joint MOTION for Extension of Time to File Rule 26(f) Planning Report, Joint Case Management Statement and Initial Case Management Conference (scc, COURT STAFF) (Filed on 3/20/2009) (Entered: 03/20/2009)
04/01/2009	64	ORDER by Judge Claudia Wilken denying 17 Motion to Compel Arbitration; denying 27 Motion to Compel Arbitration (scc, COURT STAFF) (Filed on 4/1/2009) (Entered: 04/01/2009)
04/10/2009	65	MOTION for Leave to File Motion for Reconsideration and/or Clarification Pursuant to L.R. 7-9 with Respect to the Court's April 1, 2009 Order Denying Its Motion to Compel Arbitration filed by Compucredit Corporation, Columbus Bank and Trust. (Germaise, Susan) (Filed on 4/10/2009) Modified on 4/13/2009

Filed	#	Docket Text
		(cp, COURT STAFF). (Entered: 04/10/2009)
04/30/2009		ADR Remark: ADR Phone Conference held by HAH on 4/21/09. A further ADR Phone Conference has been scheduled for 5/28/09 at 9:30 a.m. (tjs, COURT STAFF) (Filed on 4/30/2009) (Entered: 04/30/2009)
04/30/2009	66	NOTICE OF APPEAL as to 64 Order on Motion to Compel, by Compucredit Corporation, Columbus Bank and Trust. Filing fee $ 455.00, receipt #44611003526. (cp, COURT STAFF) (Filed on 4/30/2009) (Entered: 05/01/2009)
05/01/2009	67	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 66 Notice of Appeal (cp, COURT STAFF) (Filed on 5/1/2009) (Entered: 05/01/2009)
05/01/2009		Copy of Notice of Appeal and Docket sheet mailed to all counsel (cp, COURT STAFF) (Filed on 5/1/2009) (Entered: 05/01/2009)
05/05/2009	68	USCA Case Number 09-15906 Ninth Circuit Court of Appeals for 66 Notice of Appeal filed by Compucredit Corporation, Columbus Bank and Trust.

Filed	#	Docket Text
		(Attachments: # 1 USCA Time Scheduling Order) (kk, COURT STAFF) (Filed on 5/5/2009) (Entered: 05/05/2009)
05/05/2009	69	CASE MANAGEMENT STATEMENT (Joint) filed by Ladelle Hatfield, Wanda Greenwood, Deborah McCleese, Compucredit Corporation, Columbus Bank and Trust. (Barnes, Adrian) (Filed on 5/5/2009) (Entered: 05/05/2009)
05/05/2009	70	REPORT of Rule 26(f) Planning Meeting (Joint). (Barnes, Adrian) (Filed on 5/5/2009) (Entered: 05/05/2009)
05/06/2009	71	MOTION to Stay Proceedings filed by Compucredit Corporation, Columbus Bank and Trust. Motion Hearing set for 6/11/2009 02:00 PM in Courtroom 2, 4th Floor, Oakland. (Germaise, Susan) (Filed on 5/6/2009) Modified on 5/7/2009 (cp, COURT STAFF). (Entered: 05/06/2009)
05/06/2009	72	Declaration of Susan L. Germaise in Support of 71 MOTION to Stay Proceedings filed by Compucredit Corporation, Columbus Bank and Trust. (Attachments: # 1 Proposed Order re Motion to Stay) (Related

Filed	#	Docket Text
		document(s) 71) (Germaise, Susan) (Filed on 5/6/2009) Modified on 5/7/2009 (cp, COURT STAFF). (Entered: 05/06/2009)
05/08/2009	73	ORDER re 71 TAKING MOTION UNDER SUBMISSION. 6/11/09 hearing vacated. Signed by Judge CLAUDIA WILKEN on 5/8/09. (scc, COURT STAFF) (Filed on 5/8/2009) (Entered: 05/08/2009)
05/08/2009	74	MOTION to Stay Proceedings Pending Resolution of Their Motion for Stay Pending Appeal filed by Compucredit Corporation, Columbus Bank and Trust. (Attachments: # 1Proposed Order re Administrative Motion) (Germaise, Susan) (Filed on 5/8/2009) Modified on 5/11/2009 (cp, COURT STAFF). (Entered: 05/08/2009)
05/08/2009	75	Declaration of Susan L. Germaise in Support of 74 MOTION to Stay Proceedings Pending Resolution of Their Motion for Stay Pending Appeal filed by Compucredit Corporation. (Related document(s) 74) (Germaise, Susan) (Filed on 5/8/2009) Modified on 5/11/2009 (cp, COURT STAFF). (Entered: 05/08/2009)
05/11/2009	76	ORDER by Judge Claudia Wilken

Filed	#	Docket Text
		denying 65 DEFENDANTS MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OR CLARIFICATION (scc, COURT STAFF) (Filed on 5/11/2009) (Entered: 05/11/2009)
05/14/2009	77	ORDER by Judge Claudia Wilken denying 74 Defendants' MOTION to Stay Proceedings Pending Resolution of Their Motion for Stay Pending Appeal (scc, COURT STAFF) (Filed on 5/14/2009) (Entered: 05/14/2009)
05/15/2009	78	Memorandum in Opposition to Defendants' Motion to Stay Proceedings filed byLadelle Hatfield, Wanda Greenwood, Deborah McCleese. (Barnes, Adrian) (Filed on 5/15/2009) (Entered: 05/15/2009)
05/15/2009	79	STIPULATION of the Parties to Filing of Second Amended Complaint; (Proposed) Order by Ladelle Hatfield, Wanda Greenwood, Deborah McCleese, Compucredit Corporation, Columbus Bank and Trust. (Attachments: # 1 Declaration re: Signatures to Stipulation, # 2 Second Amended Complaint) (Barnes, Adrian) (Filed on

Filed	#	Docket Text
		5/15/2009) Modified on 5/18/2009 (cp, COURT STAFF). (Entered: 05/15/2009)
05/20/2009	80	MINUTE ORDER AND CASE MANAGEMENT ORDER: Further Case Management Conference set for 12/3/2009 02:00 PM. Class Certification Motion Hearing set for 12/3/2009 02:00 PM.. Signed by Judge Claudia Wilken on 5/20/09. (scc, COURT STAFF) (Filed on 5/20/2009) (Entered: 05/20/2009)
05/21/2009	81	ORDER re 79 granting STIPULATION of the Parties to Filing of Second Amended Complaint. Signed by Judge Claudia Wilken on 5/21/09. (Attachments: # 1 Proposed Second Amended Complaint) (scc, COURT STAFF) (Filed on 5/21/2009) (Entered: 05/21/2009)
05/22/2009	82	REPLY in support of Motion re 71 MOTION to Stay Proceedings filed by Compucredit Corporation, Columbus Bank and Trust. (Germaise, Susan) (Filed on 5/22/2009) Modified on 5/27/2009 (cp, COURT STAFF). (Entered: 05/22/2009)
05/22/2009		ADR Remark: The further ADR Phone Conference scheduled for

Filed	#	Docket Text
		5/28/09 at 9:30 a.m., shall go forward as planned with Howard A. Herman, ADR Program Director. (af, COURT STAFF) (Filed on 5/22/2009) (Entered: 05/22/2009)
05/29/2009		ADR Remark: ADR Phone Conference held by Howard A. Herman, ADR Program Director, on 5/28/09. (af, COURT STAFF) (Filed on 5/29/2009) (Entered: 05/29/2009)
06/01/2009	83	Transcript Designation and Ordering Form for proceedings held on 02/26/2009 before Judge Claudia Wilken re 66 Notice of Appeal, Transcript due by 6/29/2009. (Germaise, Susan) (Filed on 6/1/2009) Modified on 6/2/2009 (cp, COURT STAFF). (Entered: 06/01/2009)
06/02/2009	84	Transcript of Proceedings held on February 26, 2009, before Judge Claudia Wilken. Court Reporter Raynee H. Mercado, Telephone number 510-451-7530, raynee_mercado@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the

Filed	#	Docket Text
		Court Reporter until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Redaction Request due 6/22/2009. Redacted Transcript Deadline set for 6/30/2009. Release of Transcript Restriction set for 8/28/2009. (rhm) (Filed on 6/2/2009) (Entered: 06/02/2009)
06/03/2009	85	Certificate of Record Mailed to USCA re appeal 66 Notice of Appeal : (cp, COURT STAFF) (Filed on 6/3/2009) (Entered: 06/03/2009)
06/11/2009	86	Second AMENDED COMPLAINT against Columbus Bank and Trust, and Compucredit Corporation. Filed by Wanda Greenwood, Deborah McCleese, Ladelle Hatfield. (Barnes, Adrian) (Filed on 6/11/2009) Modified on 6/12/2009 (cjl, COURT STAFF). (Entered: 06/11/2009)
06/15/2009	87	MOTION for Leave to File Third Amended Complaint filed by Wanda Greenwood, Ladelle Hatfield, Deborah McCleese.

Filed	#	Docket Text
		Motion Hearing set for 7/23/2009 02:00 PM in Courtroom 2, 4th Floor, Oakland. (Attachments: # 1 Exhibit Exhibit A - Proposed Third Amended Complaint, # 2 Proposed Order) (Barnes, Adrian) (Filed on 6/15/2009) (Entered: 06/15/2009)
06/18/2009	88	ORDER by Judge Claudia Wilken granting in part 71 Motion to Stay Proceedings Pending Appeal (scc, COURT STAFF) (Filed on 6/18/2009) (Entered: 06/18/2009)

* * *

APPENDIX B

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

United States Circuit Court of Appeals for the Ninth Circuit

No. 09-15906

Filed	#	Docket Text
05/05/2009	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND CADS: Yes. The schedule is set as follows: CADS due by Attorney Susan L. Germaise, Attorney due on 04/30/2009. Transcript order for Appellant Columbus Bank and Trust and Appellant CompuCredit Corporation due 06/01/2009. Transcript due for Orig Clerk USDC, Oakland on 06/29/2009. Certificate of record due 07/06/2009. Appellant Columbus Bank and Trust and Appellant CompuCredit Corporation opening brief due 08/17/2009. Appellee Wanda Greenwood, Appellee Ladelle Hatfield and Appellee Deborah McCleese answering brief due 09/14/2009. Appellant's optional reply brief is due 14 days after service of the answering brief.

Filed	#	Docket Text
		(GR)
05/07/2009	4	Filed Appellant Columbus Bank and Trust Civil Appeals Docketing Statement. Served on 05/04/2009. (EL)
05/08/2009	2	Filed appearance notice of Susan L. Germaise for party(s) Appellant CompuCredit Corporation. Served on 05/07/2009. (EL)
05/11/2009	3	Filed Civil Appeals Docketing Statement. Served on 05/08/2009. (EL)
05/19/2009	5	Filed order MEDIATION (VLS): This case is under consideration for inclusion in the Mediation Program. Within 14 days of the date of this order, counsel for all parties intending to file briefs in this matter are requested to inform C. Lewis Ross, Circuit Mediator, in writing, by fax at (415) 355-8566, of their clients' views on whether:.....This communication shall not be served on the opposing party and shall not be filed with the court. The briefing schedule previously established by the court, if any, remains in effect. (AF)
06/04/2009	6	Filed certificate of record on

Filed	#	Docket Text
		appeal. RT filed in DC 6/2/09 (EL)
06/11/2009	7	Filed order MEDIATION (VLS): This case is under consideration for inclusion in the Mediation Program. A settlement assessment conference will be held by telephone on July 8, 2009, at 1:00 p.m. PACIFIC (San Francisco) Time. The briefing schedule previously set by the court remains in effect. (AF)
07/08/2009	8	Filed order MEDIATION (CLR): The court will initiate a further assessment conference by telephone on July 13, 2009, at 2:00 p.m. PACIFIC (San Francisco) Time. [6985371] (AF)
07/14/2009	9	Filed order MEDIATION (CLR): The briefing schedule previously set by the court is amended as follows: appellants shall file an opening brief on or before October 9, 2009; appellees shall file an answering brief on or before November 9, 2009; appellants may file an optional reply brief on or before November 23, 2009. On or before August 21, 2009, the parties shall make an oral status report to the undersigned. [6991271]

Filed	#	Docket Text
		(AF)
10/09/2009	10	Submitted (ECF) Opening brief for review. Submitted by Appellants Columbus Bank and Trust and CompuCredit Corporation. Date of service: 10/09/2009. [7091158] (SLG)
10/09/2009	12	Filed Appellants Columbus Bank and Trust and CompuCredit Corporation excerpts of record in 2 volumes. Served on 10/08/2009. [7093105] (WP)
10/13/2009	11	Filed clerk order: Opening Brief [10] filed by CompuCredit Corporation and Columbus Bank and Trust. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7092404] (WP)
10/15/2009	13	Received 10 paper copies of Opening brief [10] filed by CompuCredit Corporation and Columbus Bank and Trust in 09-15906. One copy to Case Files, the remainder to Records. [7097131] (SD)

Filed	#	Docket Text
11/09/2009	14	ENTRY UPDATED [Edited 11/10/2009 by WP] Filed Appellees Wanda Greenwood, Ladelle Hatfield and Deborah McCleese excerpts of record in 1 volume. Served on 11/09/2009. [7124231] (WP)
11/09/2009	15	Submitted (ECF) Answering brief for review. Submitted by Appellees Wanda Greenwood, Ladelle Hatfield and Deborah McCleese. Date of service: 11/09/2009. [7124770] (AB)
11/09/2009	16	Filed (ECF) Appellees Wanda Greenwood, Ladelle Hatfield and Deborah McCleese Motion to take judicial notice of NAF Consent Judgment & AAA Announcement. Date of service: 11/09/2009. [7124891] (AB)
11/10/2009	17	Filed clerk order: answering brief [15] filed by Wanda Greenwood, Ladelle Hatfield and Deborah McCleese. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically.

Filed	#	Docket Text
		[7126096] (WP)
11/17/2009	18	Received 10 paper copies of Answering brief [15] filed by Wanda Greenwood, Ladelle Hatfield and Deborah McCleese. One copy to Case Files, the remainder to Records. [7132512] (SD)
11/23/2009	19	Filed order MEDIATION (CLR): The court has determined that this appeal will not be selected for inclusion in the Mediation Program. [7139610] (AF)
11/23/2009	20	Submitted (ECF) Reply brief for review. Submitted by Appellants Columbus Bank and Trust and CompuCredit Corporation. Date of service: 11/23/2009. [7140573] (SLG)
11/25/2009	21	Filed clerk order: The reply brief [20] submitted by Columbus Bank and Trust and CompuCredit Corporation is filed. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a grey cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically.

Filed	#	Docket Text
		[7143714] (GLS)
12/01/2009	22	Received 10 paper copies of Reply brief [20] filed by Columbus Bank and Trust and CompuCredit Corporation. One copy to Case Files, the remainder to Records. [7148018] (SD)
02/17/2010	23	Notice of Oral Argument on APRIL 12, 2010 Calendar. Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Attention: The Notice of Docket Activity may not list your case number. Please open attached documents to view details about your case. [7234451] (AM)
04/12/2010	24	ARGUED AND SUBMITTED TO ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS. [7297579] (RS)
04/14/2010	25	Filed (ECF) Appellant CompuCredit Corporation citation of supplemental authorities. Date of service: 04/14/2010. [7300467] (SLG)
08/17/2010	26	FILED OPINION (ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS) AFFIRMED. Judge:

Filed	#	Docket Text
		AWT Dissenting, Judge: SRT Authoring. FILED AND ENTERED JUDGMENT. [7442110] (RP)
08/19/2010	27	Filed (ECF) Appellees Wanda Greenwood, Ladelle Hatfield and Deborah McCleese bill of costs (Form 10) in the amount of $153 USD. Date of service: 08/19/2010 [7446057] (AB)
08/24/2010	28	Filed (ECF) Appellant Columbus Bank and Trust Motion to extend time to file petition for rehearing until 09/07/2010 at 05:00 pm. Date of service: 08/24/2010. [7450212] (TAO)
08/24/2010	29	Filed clerk order (Deputy Clerk:LC): Granting appellants Columbus Bank & Trust and Compucredit Corporation (ECF Filing) 7-day motion to extend time to file petition for rehearing. Appellant Columbus Bank & Trust; and Compucredit Corporation's Petition for rehearing and/ or rehearing en banc is due on or before 09/07/2010. [7450480] (LC)
08/30/2010	30	Filed (ECF) notice of appearance of Brian R. Matsui for Appellant Columbus Bank and Trust. Date of service: 08/30/2010. [7456337]

Filed	#	Docket Text
		(TAO)
08/30/2010	31	Filed (ECF) notice of appearance of Deanne E. Maynard for Appellant Columbus Bank and Trust. Date of service: 08/30/2010. [7456341] (TAO)
08/30/2010	32	Filed (ECF) Appellant Columbus Bank and Trust Unopposed Motion to extend time to file petition for rehearing until 09/28/2010 at 05:00 pm. Date of service: 08/30/2010. [7456470] (TAO)
08/30/2010	33	Added attorney Brian Matsui for Columbus Bank and Trust, in case 09-15906. [7457269] (RR)
08/30/2010	34	Added attorney Deanne Maynard for Columbus Bank and Trust, in case 09-15906. [7457280] (RR)
08/31/2010	35	Filed order (SIDNEY R. THOMAS): Appellants' motion for a 21 day extension of time within which to file a petition for rehearing and petition for rehearing en banc is GRANTED. The petition for rehearing and petition for rehearing en banc shall be filed on or before September 29, 2010. [7458616] (AF)
09/29/2010	36	COURT DELETED

Filed	#	Docket Text
		INCORRECT ENTRY: Correct entry: [37]. Original text: Filed (ECF) Appellants Columbus Bank and Trust and CompuCredit Corporation petition for rehearing en banc (from 08/17/2010 opinion). Date of service: 09/29/2010. [7491498]--[COURT UPDATE: Attached corrected Petition (Certificate of Compliance) and 8/17/2010 Opinion. Resent notice. 10/01/2010 by RY] AO)
10/04/2010	37	Filed (ECF) Appellants Columbus Bank and Trust and CompuCredit Corporation petition for panel rehearing and petition for rehearing en banc (from 08/17/2010 opinion). Date of service: 10/04/2010. [7495434] (TAO)
10/27/2010	38	Filed order (ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS): Judges Kleinfeld and Thomas have voted to deny the appellants' petition for rehearing. Judge Tashima has voted to grant the appellants' petition for rehearing. Judge Thomas has voted to deny the appellants' petition for rehearing

Filed	#	Docket Text
		en banc and Judge Kleinfeld has so recommended. Judge Tashima has recommended that the appellants' petition for rehearing en banc be granted. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing and the petition for rehearing en banc are rejected. [7524060] (AF)
11/02/2010	39	Filed (ECF) Appellants Columbus Bank and Trust and CompuCredit Corporation Motion to stay the mandate. Date of service: 11/02/2010. [7532387] (DLH)
12/21/2010	40	Filed order (ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS): The appellants' motion to stay the mandate pending the filing of a petition for writ of certiorari is granted. The issuance of the mandate shall be stayed for ninety (90) days from the date of this order. [7588473] (AF)
01/28/2011	41	Received notice from the

Filed	#	Docket Text
		Supreme Court: petition for certiorari filed on 01/24/2011 and placed on the docket 1/25/11. Supreme Court Number 10-948. [7629286] (RR)
03/01/2011	42	Filed (ECF) Appellant CompuCredit Corporation Motion to stay the mandate. Date of service: 03/01/2011. [7664016]--[COURT UPDATE: Replaced PDF of motion (searchable). Resent NDA. 03/02/2011 by TW] (SLG)
03/02/2011	43	COURT DELETED ENTRY : Correct entry above [42]. Original text: Filed (ECF) Appellant CompuCredit Corporation Motion to stay the mandate. Date of service: 03/01/2011. [7665202] (SLG)
03/08/2011	44	Filed order (ANDREW J. KLEINFELD, A. WALLACE TASHIMA and SIDNEY R. THOMAS): The appellants' motion to extend the stay of the mandate pending the Supreme Court's final disposition of this matter is granted. Under Federal Rule of Appellate Procedure 41(d)(2)(B), the stay shall continue until the Supreme Court's final disposition.

Filed	#	Docket Text
		[7673282] (AF)
05/03/2011	45	**Received notice from the Supreme Court. Petition** for **certiorari GRANTED on 05/02/2011. Supreme Court** Number 10-948. [7739034] (RR)

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

WANDA GREENWOOD, LADELLE HATFIELD, and DEBORAH MCCLEESE on behalf of themselves and all others similarly situated, Plaintiffs, v. COMPUCREDIT CORPORATION; COLUMBUS BANK AND TRUST, jointly and individually, Defendants.	Case No. 4:08-cv-4878 **FIRST AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND**

SUMMARY OF ACTION

1. Plaintiffs Wanda Greenwood, Ladelle Hatfield, and Deborah McCleese ("Plaintiffs") bring this Class Action Complaint against Defendants Compucredit Corporation ("Compucredit") and Columbus Bank and Trust ("Columbus") to redress violations of the federal Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679 et seq., and the state

Unfair Competition Law, ("UCL"), Cal. Bus. & Prof. Code §§ 17200 et seq.

JURISDICTION, VENUE AND PARTIES

2. This action arises under the CROA, 15 U.S.C. § 1679 et seq. Subject matter jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1331. This Court has supplemental jurisdiction of the state claims under 28 U.S.C. § 1367.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1) and (2) and (c).

4. Plaintiff Wanda Greenwood is a resident citizen of Oakland, California, in this District.

5. Plaintiff Ladelle Hatfield is a resident citizen of Berkeley, California, in this District.

6. Plaintiff Deborah McCleese is a resident citizen of San Leandro, California, in this District.

7. Defendant Compucredit is and at all times mentioned herein was a corporation organized under the laws of the State of Georgia doing business in this District.

8. Defendant Columbus is and at all times mentioned herein was a corporation organized under the laws of the State of Georgia doing business in this District.

9. Defendants Compucredit and Columbus have transacted and continue to transact substantial business in this District, such that they are subject to personal jurisdiction in this District.

10. A substantial part of the events and omissions giving rise to the claims of Plaintiffs occurred in this District.

FACTUAL BACKGROUND

11. Defendant Compucredit has marketed a subprime credit card under the brand name Aspire Visa to consumers with low or weak credit scores. Compucredit has promoted and marketed Aspire Visa through massive direct-mail solicitations and on the Internet. These promoting and marketing activities persistently represented to consumers that an Aspire Visa credit card purchased by the consumer could be used by the consumer to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." Compucredit is the exclusive marketer and advertiser of Aspire Visa credit cards. Aspire Visa credit cards are issued by Columbus.

12. Compucredit's promoting and marketing efforts also repeatedly stated that there was "no deposit required," that the consumer was "pre-qualified," and that consumers would immediately receive $300 in available credit when they received the Aspire Visa credit card. These representations were prominently made in Compucredit's advertisements. Columbus was aware of the content of Compucredit's marketing material.

13. Plaintiffs are informed and believe, and on the basis of such information and belief allege, that when a consumer was approved for an Aspire Visa credit card account, Columbus issued the consumer a credit card and an "account opening fee finance charge" of $29, an "account maintenance fee" of $6.50 per month, and an "annual fee" of $150 were

uniformly assessed to the account. Upon information and belief, these fees were assessed by Compucredit. All of these fees were immediately assessed against the $300 credit limit before the consumer received the credit card, resulting in an immediate available credit limit to the consumer of approximately $114.50. Moreover, due to the monthly "account maintenance fee," aggregate firstyear fees of $257 were assessed to the account and its $300 credit limit. These fees were only recited in small font, were buried in other information in the advertisements, were not prominent, and were not in proximity to Compucredit's representations set out above that no deposit was required, that the consumer was pre-qualified, and that a $300 credit limit was immediately available.

14. Columbus was aware of, participated in, and ratified, the scheme to charge consumers an amount equal to approximately 62% of the card's total available credit limit immediately and to assess over 86% of the card's available credit limit over the first year of owning the card. Columbus agreed with Compucredit to issue Aspire Visa credit cards to consumers pursuant to Compucredit's marketing plan described above.

15. Plaintiffs each saw Compucredit's advertisements set out above.

16. Plaintiffs each applied for and received an Aspire Visa credit card.

17. When Plaintiffs' Aspire Visa credit card accounts were opened, Compucredit immediately assessed against the account and its $300 credit limit the "account opening fee finance charge," "the

account maintenance fee" and the "annual fee" set out above, before Plaintiffs received their credit cards.

18. Plaintiffs are informed and believe, and on the basis of such information and belief allege, that they have paid Compucredit money, directly or through Columbus, on their Aspire Visa accounts.

19. Compucredit is a "credit repair organization" within the meaning of 15 U.S.C. § 1679a(3)(A).

20. Compucredit did not rebuild Plaintiffs' credit or improve Plaintiffs' credit ratings, and did not provide assistance to Plaintiffs with regard to rebuilding their credit or improving their credit ratings.

21. Compucredit charged Plaintiffs money to rebuild their credit or to improve their credit ratings before such service was fully performed. Compucredit charged Plaintiffs money to provide assistance to Plaintiffs with regard to rebuilding their credit or improving their credit ratings before such service was fully performed.

22. Compucredit charged Plaintiffs money for the "account opening fee finance charge," the "account maintenance fee" and the "annual fee" when Compucredit agreed to furnish them with an immediate credit limit of $300, and thereby charged them those fees before that service was fully performed.

23. Compucredit did not provide Plaintiffs with the written disclosures required by 15 U.S.C. §

1679c before the agreements between Plaintiffs and Compucredit were executed.

24. Compucredit did not provide Plaintiffs with the written contracts required by 15 U.S.C. § 1679d.

25. Compucredit did not provide Plaintiffs with the cancellation forms required by 15 U.S.C. § 1679e.

CLASS ACTION ALLEGATIONS

26. Plaintiffs bring this class action on their own behalf and on behalf of two classes of consumers designated pursuant to Fed. R. Civ. P. Rule 23(a) and 23(b)(3).

CLASS I: THE CROA CLASS

27. A first class consists of:

> All natural persons residing in the United States who, within five years prior to the commencement of this action, were issued an Aspire Visa credit card by Columbus Bank and Trust and paid money to Compucredit Corporation, directly or through Columbus, on their Aspire Visa credit card accounts.
>
> Excluded from the Class are all persons residing in the State of Nebraska as of the date of class certification in this case.

CLASS II: THE UCL CLASS

28. A second class consists of:

> All natural persons residing in the State of California as of the date of class

certification in this case who, within four years prior to the commencement of this action, were issued an Aspire Visa credit card by Columbus Bank and Trust and paid money to Compucredit Corporation, directly or through Columbus, on their Aspire Visa credit card accounts.

29. The members of each Class are so numerous that joinder of all members is impracticable. Plaintiffs allege on information and belief that the Classes consist of thousands of members. The precise number and identity of the Class members can be ascertained from the books and records of Compucredit and Columbus.

30. There are questions of law and/or fact common to each Class that predominate over any questions affecting individual Class members.

31. With respect to the first class these questions include, but are not limited to, the following:

a. Whether Compucredit is a credit repair organization within the meaning of 15 U.S.C. § 1679a(3)(A);

b. Whether Compucredit's representations in its advertisements were untrue or misleading representations of its services in violation of 15 U.S.C. § 1679b(a)(3);

c. Whether Compucredit charged money in advance for the performance of services which it had agreed to perform

for the consumer before such services were fully performed;

d. Whether Compucredit furnished the disclosures required by 15 U.S.C. § 1679c;

e. Whether Compucredit provided written contracts in compliance with 15 U.S.C. § 1679d;

f. Whether Compucredit furnished a cancellation form as required by 15 U.S.C. § 1679e;

g. Whether Columbus is subject to 15 U.S.C. § 1679b(a)(3) and (4);

h. Whether Columbus and/or Compucredit engaged in, directly or indirectly, the commission of, or an attempt to commit, a deception on Class members in connection with the extension of credit to Class members pursuant to Compucredit's marketing plan, in violation of 15 U.S.C. § 1679b(a)(4); and

i. Whether Columbus used untrue or misleading representations of Compucredit's services made by Compucredit in its advertisements, in violation of 15 U.S.C. § 1679b(a)(3).

32. With respect to the second Class these questions include, but are not limited to, all questions common to the first Class, and the following:

a. Whether Columbus' and Compucredit's conduct and practices constitute

unlawful, unfair, or fraudulent business practices in violation of California's UCL, Cal. Bus. & Prof. Code §§ 17200 – 17209; and

b. Whether Columbus and Compucredit engaged in unfair, deceptive, untrue or misleading advertising in violation of California's UCL, Cal. Bus. & Prof. Code §§ 17200 – 17209.

33. Plaintiffs are committed to vigorously prosecuting this action and have retained experienced and competent counsel. Plaintiffs' counsel are highly experienced in complex consumer class actions. Neither Plaintiffs nor their counsel have any interests that might cause them not to vigorously pursue this action.

34. A well-defined community of interest and common questions of law and fact affect the parties to be represented in this class action. Plaintiffs' interests are coextensive with those of the Classes, and Plaintiffs have no interests adverse to those of the absent Class members.

35. The claims of the named Plaintiffs are typical of the claims of each of the proposed Classes, and Plaintiffs have the same interests as the other members of each Class.

36. Plaintiffs are adequate representatives of both Classes and will fairly and adequately protect the interests of each Class.

37. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Disposition of the Class members'

claims in this class action will provide substantial benefits to the parties and the judicial system. No difficulties are likely to be encountered in the management of this action as a class action.

CAUSES OF ACTION

COUNT I – COMPUCREDIT'S VIOLATIONS OF THE CREDIT REPAIR ORGANIZATIONS ACT.

38. Plaintiffs reassert and incorporate herein all preceding allegations and allege as follows on behalf of themselves and Class I.

39. Each Plaintiff is a consumer as defined in 15 U.S.C. § 1679a(1).

40. Compucredit is a credit repair organization as defined in 15 U.S.C. § 1679a(3)(A).

41. Compucredit made untrue or misleading representations of its services to Plaintiffs and the Class members in violation of 15 U.S.C. § 1679b(a)(3), as follows:

a. Compucredit represented that an Aspire Visa credit card purchased by Plaintiffs and the Class members could be used by Plaintiffs and the Class members to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." Compucredit knew that an Aspire Visa credit card would be extremely difficult, if not impossible, to use to rebuild credit and improve a credit rating because of the fees which would be assessed against the $300 credit limit both immediately and over

the first year of owning the card. These fees were recited in Compucredit's advertisements in such a manner that they would not be discerned by the average consumer.

b. Compucredit represented that it would provide assistance to Plaintiffs and the Class members with regard to rebuilding their credit and improving their credit rating, through their purchase of an Aspire Visa credit card. Compucredit knew that the purchase of an Aspire Visa credit card would not provide any meaningful assistance whatsoever with regard to rebuilding credit and improving a credit rating, for the reasons set out in the preceding subparagraph.

c. Compucredit represented that a $300 credit limit would immediately be available if Plaintiffs and the Class members purchased an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card.

d. Compucredit represented that no deposit was required if Plaintiffs and the Class members purchased an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members

received the card. Charging approximately $185 in fees against the account before the card was eceived was the functional equivalent of a deposit.

e. Compucredit represented that Plaintiffs and the Class members were pre-qualified for the purchase of an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card. The representation that Plaintiffs and the Class members were prequalified reasonably implied to the average consumer that no fees would be charged against the account before the card was received.

42. Compucredit engaged, directly or indirectly, in an act, practice, or course of business that constituted or resulted in the commission of, or an attempt to commit, a deception on Plaintiffs and the Class members in connection with Compucredit's offer or sale of its services in violation of 15 U.S.C. § 1679b(a)(4), as follows:

a. Compucredit represented that an Aspire Visa credit card purchased by Plaintiffs and the Class members could be used by Plaintiffs and the Class members to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." Compucredit knew that an Aspire Visa credit card would be extremely difficult, if not impossible, to

use to rebuild credit and improve a credit rating because of the fees which would be assessed against the $300 credit limit both immediately and over the first year of owning the card. These fees were recited in Compucredit's advertisements in such a manner that they would not be discerned by the average consumer.

b. Compucredit represented that it would provide assistance to Plaintiffs and the Class members with regard to rebuilding their credit and improving their credit rating, through their purchase of an Aspire Visa credit card. Compucredit knew that the purchase of an Aspire Visa credit card would not provide any meaningful assistance whatsoever with regard to rebuilding credit and improving a credit rating, for the reasons set out in the preceding subparagraph.

c. Compucredit represented that a $300 credit limit would immediately be available if Plaintiffs and the Class members purchased an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card.

d. Compucredit represented that no deposit was required if Plaintiffs and the Class members purchased an

Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card. Charging approximately $185 in fees against the account before the card was received was the functional equivalent of a deposit.

e. Compucredit represented that Plaintiffs and the Class members were pre-qualified for the purchase of an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card. The representation that Plaintiffs and the Class members were prequalified reasonably implied to the average consumer that no fees would be charged against the account before the card was received.

f. Compucredit's aforesaid representations set out in this paragraph were made with the intent to deceive Plaintiffs and the Class members.

43. Compucredit received payment in advance from Plaintiffs and the Class members for services that it had agreed to perform and before such services were fully performed, in violation of 15 U.S.C. § 1679b(b).

44. Compucredit did not provide Plaintiffs and the Class members with the disclosures required by 15 U.S.C. § 1679c.

45. Compucredit did not provide Plaintiffs and the Class members with written contracts in compliance with 15 U.S.C. § 1679d.

46. Compucredit did not provide Plaintiffs and the Class members with the cancellation form required by 15 U.S.C. § 1679e.

47. Pursuant to 15 U.S.C. § 1679g(a)(1)(B), Plaintiffs and the Class I members have been damaged by Compucredit's actions in the amount they paid, directly or through Columbus, to Compucredit.

COUNT II – COLUMBUS' VIOLATIONS OF THE CREDIT REPAIR ORGANIZATIONS ACT.

48. Plaintiffs reassert and incorporate herein all preceding allegations and allege as follows on behalf of themselves and the members of Class I.

49. Columbus used Compucredit's untrue or misleading representations of its services to Plaintiffs and the Class members, in violation of 15 U.S.C. § 1679b(a)(3), as follows:

a. Compucredit represented that an Aspire Visa credit card purchased by Plaintiffs and the Class members could be used by Plaintiffs and the Class members to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." This representation was untrue or misleading for the reasons set

out in Paragraph 41(a) hereof. Columbus used this representation by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this representation to prospective cardholders.

b. Compucredit represented that it would provide assistance to Plaintiffs and the Class members with regard to rebuilding their credit and improving their credit rating, through their purchase of an Aspire Visa credit card. This representation was untrue or misleading for the reasons set out in Paragraph 41(b) hereof. Columbus used this representation by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this representation to prospective cardholders.

c. Compucredit represented that a $300 credit limit would immediately be available if Plaintiffs and the Class members purchased an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card. Columbus used this representation by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this

representation to prospective cardholders.

d. Compucredit represented that no deposit was required if Plaintiffs and the Class members purchased an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card. This representation was untrue or misleading for the reasons set out in Paragraph 41(d) hereof. Columbus used this representation by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this representation to prospective cardholders.

e. Compucredit represented that Plaintiffs and the Class members were pre-qualified for the purchase of an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card. This representation was untrue or misleading for the reasons set out in Paragraph 41(e) hereof. Columbus used this representation by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this

representation to prospective cardholders.

50. Columbus engaged, directly or indirectly, in acts, practices or courses of business that constituted or resulted in the commission of, or an attempt to commit, a deception on Plaintiffs and the Class members in connection with the offer or sale of the services of Compucredit, in violation of 15 U.S.C. § 1679b(a)(4), as follows:

a. Compucredit represented that an Aspire Visa credit card purchased by Plaintiffs and the Class members could be used by Plaintiffs and the Class members to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." This representation constituted the commission of a deception or an attempt thereat on Plaintiffs and the Class members for the reasons set out in Paragraph 42(a) hereof. Columbus engaged directly or indirectly in this act, practice or course of business by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this representation to prospective cardholders.

b. Compucredit represented that it would provide assistance to Plaintiffs and the Class members with regard to rebuilding their credit and improving their credit rating, through their

purchase of an Aspire Visa credit card. This representation constituted the commission of a deception or an attempt thereat on Plaintiffs and the Class members for the reasons set out in Paragraph 42(b) hereof. Columbus engaged directly or indirectly in this act, practice or course of business by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this representation to prospective cardholders.

c. Compucredit represented that a $300 credit limit would immediately be available if Plaintiffs and the Class members purchased an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card. Columbus engaged directly or indirectly in this act, practice or course of business by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this representation to prospective cardholders.

d. Compucredit represented that no deposit was required if Plaintiffs and the Class members purchased an Aspire Visa credit card, when approximately $185 in fees were charged against the account before

Plaintiffs and the Class members received the card. This representation constituted the commission of a deception or an attempt thereat on Plaintiffs and the Class members for the reasons set out in Paragraph 42(d) hereof. Columbus engaged directly or indirectly in this act, practice or course of business by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this representation to prospective cardholders.

e. Compucredit represented that Plaintiffs and the Class members were pre-qualified for the purchase of an Aspire Visa credit card, when approximately $185 in fees were charged against the account before Plaintiffs and the Class members received the card. This representation constituted the commission of a deception or an attempt thereat on Plaintiffs and the Class members for the reasons set out in Paragraph 42(e) hereof. Columbus engaged directly or indirectly in this act, practice or course of business by agreeing to issue and by issuing Aspire Visa credit cards pursuant to Compucredit's marketing plan which contained this representation to prospective cardholders.

f. Compucredit's aforesaid representations set out in this paragraph were made with the intent to deceive Plaintiffs and the Class members.

51. Pursuant to 15 U.S.C. § 1679g(a)(1)(B), Plaintiffs and the Class I members have been damaged by Columbus's actions in the amount they paid, directly or through Columbus, to Compucredit.

COUNT III – VIOLATIONS OF STATE UNFAIR COMPETITION LAW BY BOTH DEFENDANTS

52. Plaintiffs reassert and incorporate herein all preceding allegations and allege as follows on behalf of themselves and the Class II members.

53. The conduct and practices of Defendants, as alleged above, constitute unlawful, unfair, or fraudulent business practices, within the meaning of section 17200 of the California Business & Professions Code, and violate California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 – 17209.

54. The conduct and practices of Defendants, as alleged above, constitute unfair, deceptive, untrue or misleading advertising, within the meaning of section 17200 of the California Business & Professions Code, and violate California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 – 17209.

PRAYER FOR RELIEF

55. Plaintiffs reallege all foregoing paragraphs of the complaint.

56. Plaintiffs ask that the Court certify both Classes proposed above, appoint Plaintiffs as Class Representative for both Classes, and appoint their belownamed attorneys as counsel for both Classes.

COUNTS I AND II

57. Plaintiffs and the Class I members respectfully ask that the Court enter judgment against Compucredit and Columbus, jointly and individually:

a. for actual damages pursuant to 15 U.S.C. § 1679g(a)(1)(B);

b. for punitive damages pursuant to 15 U.S.C. § 1679g(a)(2)(B);

c. for reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1679g(a)(3);

d. declaring their contracts with Compucredit and/or Columbus void pursuant to 15 U.S.C. § 1679f(c)(1) and (2); and

e. for such other further or additional relief as is appropriate and just.

COUNT III

58. Plaintiffs and the Class II members respectfully ask that the Court enter judgment against Compucredit and Columbus, jointly and individually:

a. for restitution of all fees unlawfully charged them by Defendants pursuant to Cal. Bus. & Prof. Code §§ 17201, 17203;

b. for disgorgement of profits acquired by Defendants and each of them by means of unfair competition, as redress for Defendants' acts constituting unfair competition, pursuant to Cal. Bus. & Prof. Code §§ 17201, 17203;

c. for injunctive relief against future acts by Defendants constituting unfair competition, pursuant to Cal. Bus. & Prof. Code §§ 17201, 17203;

d. for reasonable attorney's fees and costs, pursuant to, among other authorities, Cal. Code of Civil Procedure § 1021.5; and

e. for such other further or additional relief as is appropriate and just.

DATED: November 6, 2008

GILBERT & SACKMAN
A LAW CORPORATION
By: s/ Jay Smith

JURY DEMAND

PLAINTIFFS DEMAND TRIAL BY JURY.

DATED: November 6, 2008

GILBERT & SACKMAN
A LAW CORPORATION
By: s/ Jay Smith

APPENDIX D

EXCERPTS FROM RELEVANT AGREEMENTS (District Court Docket Number 18, Exhibits A, B & C)

Excerpt from Exhibit A, *Pre-Approved Acceptance Certificate:*

* * *

By signing, I request an Aspire Visa card and ask that an account be opened for me. I certify that everything I have stated in this Acceptance Certificate is true and accurate to the best of my knowledge. I have read and agree to be bound by the "Summary of Credit Terms" and "Terms of Offer" printed on the enclosed insert, **which insert includes a discussion of arbitration applicable to my account**, and is incorporated here by reference.

* * *

Excerpt from Exhibit B, *Terms of Offer:*

* * *

IMPORTANT—THE AGREEMENT YOU RECEIVE CONTAINS A BINDING ARBITRATION PROVISION. IF A DISPUTE IS RESOLVED BY BINDING ARBITRATION, YOU WILL NOT HAVE THE RIGHT TO GO TO COURT OR HAVE THE DISPUTE HEARD BY A JURY, TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PERMITTED UNDER THE CODE OF PROCEDURE OF THE NATIONAL ARBITRATION FORUM ("NAF") OR

TO PARTICIPATE AS PART OF A CLASS OF CLAIMANTS RELATING TO SUCH DISPUTE. OTHER RIGHTS AVAILABLE TO YOU IN COURT MAY BE UNAVAILABLE IN ARBITRATION. The Arbitrator's Decision may be final and binding. You may obtain the NAF's current code of procedure, rules and forms from any local NAF office, by visiting the NAF website at http://www.arb-forum.org, by calling 1-800-474-2371 or by writing the NAF at P.O. Box 50191, Minneapolis, MN 55405. Read the Aritration Provision in your Agreement Carefully.

* * *

Excerpt from Exhibit C, *Bank Credit Card Agreement:*

* * *

ARBITRATION PROVISION (AGREEMENT TO ARBITRATE CLAIMS)

Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, will be resolved by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure ("NAF Rules") of the National Arbitration Forum ("NAF") in effect when the Claim is filed. If for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure.

Upon such an election, neither you nor we will have the right to litigate in court the claim being arbitrated, including in a jury trial, or to engage in pre-arbitration discovery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or member of any class of claimants relating to any claim subject to arbitration. Except as set forth below, the arbitrator's decision will be final and binding. Other rights available to you in court might not be available in arbitration.

The term "Claims" covered by this Arbitration Provision is to be given the broadest possible meaning, and includes by way of example and without limitation (i) Claims arising from the application for or issuance, use, terms, change in terms or addition of terms, closing or collection of your Account or this agreement, of from advertisements, promotions or oral or written statements related to your Account, including any Claims regarding information obtained by us from, or reported by us to, redit reporting agencies or others, or Claims related to the goods or insurance or other services purchased under your account; (ii) Claims between you and our parent corporations, wholly or majority owned subsidiaries, affiliates, predecessors, successors, assigns, agents, independent contractiors,, employees, officers, directors or representatives arising from your Account or this Agreement; and (iii) Claims regarding the validity, enforceability or scope of this Arbitration Provision or this entire Agreement.

Any party to this Arbitration Provision may bring an action to compel arbitration of any Claims to which this Arbitration applies, The NAF Rules and the forms of the NAF may be obtained by calling the NAF at (800) 474-2371, by visiting the NAF's website at http://www.arbforum.com or by writing to the NAF at P.O. Box 50191, Minneapolis, MN 55405. All Claims must be filed at an NAF office or at P.O. Box 50191, Minneapolis, MN 55405. Any arbitration hearing, if one is held, will be held in the federal judicial district where you live. At your written request, we will temporarily advance up to $325 toward the filing, administrative and/or hearing fees for any Claim you may file against us, after you have paid to the NAF an amount equal to the fee, if any, for filing such a Claim in state or federal court (whichever is less) in the judicial district in which you live. At the end of the arbitration, the arbitrator will decide whether we or you will ultimately be responsible for paying any filing, administrative and/or hearing fees in connection with the arbitration. Unless inconsistent with applicable law, each party will bear the expense of its respective attorneys', experts' and witness fees, regardless of which party prevails in the arbitration. There will be no authority for any Claims to be arbitrated on a class action basis. An arbitration can decide only your or our Claims and there will be no joinder of parties other than, or consolidation of Claims other than those relating to, persons who use your Account.

This Arbitration Provision is made pursuant to a transaction involving interstate commerce, and will be governed by the Federal Arbitration Act

("FAA"), 9 U.S.C. §§ 1 et seq., as amended, notwithstanding any choice-of-law provision in this Agreement. The arbitrator will apply applicable substantive law consistent with the FAA and applicable statutes of limitations and will honor claims of privilege recognized at law. Judgment upon any arbitration award may be entered and enforced, including without limitation by garnishment, attachment, foreclosure or other post-judgment remedies, in any court having jurisdiction. The arbitrator's decision will be final and binding, except for any right of appeal provided by the FAA, in which case any party can appeal the award to a three-arbitrator panel administered by the NAF. The panel will reconsider de novo any aspect of the initial award requested by the appealing party. The appealing party will bear the costs of such an appeal regardless of its outcome.

This Arbitration Provision will survive repayment and termination of your Account. If any portion of this Arbitration Provision is deemed invalid or unenforceable under the FAA, it will not invalidate the remaining portions of this Arbitration Provision. If a conflict or inconsistency arises between the NAF Rules and this Arbitration Provision, this Arbitration Provision will control.

* * *

PETITIONER'S BRIEF

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IN THE

Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
Petitioners,

v.

WANDA GREENWOOD *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are subject to arbitration pursuant to a valid arbitration agreement.

PARTIES TO THE PROCEEDING

Petitioners are CompuCredit Corporation and Synovus Bank. CompuCredit Corporation was a defendant-appellant below. Columbus Bank and Trust Company, also a defendant-appellant below, is now known as and is a division of Synovus Bank, a petitioner in this case.

Respondents are Wanda Greenwood, Ladelle Hatfield, and Deborah McCleese, named plaintiffs below, on behalf of themselves and others similarly situated.

RULE 29.6 DISCLOSURE

CompuCredit Corporation is a wholly owned subsidiary of CompuCredit Holdings Corporation, a publicly held corporation.

Synovus Bank is a wholly owned banking subsidiary of Synovus Financial Corporation, a publicly held corporation.

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OPINIONS BELOW

The decision of the court of appeals is reported at 615 F.3d 1204, and is reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a-29a. The decision of the district court is reported at 617 F. Supp. 2d 980, and is reprinted at Pet. App. 30a-45a. The order denying a petition for rehearing and rehearing en banc is unreported, and is reprinted at Pet. App. 46a-47a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 9 U.S.C. § 16(a)(1)(B). The judgment of the court of appeals was entered on August 17, 2010. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on October 27, 2010. Pet. App. 46a-47a. The petition for a writ of certiorari was filed on January 24, 2011, and granted on May 2, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are reproduced at Pet. App. 48a-64a.

STATEMENT OF THE CASE

A. Statutory Background

1. ***Federal Arbitration Act (FAA).*** "The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." ***AT&T Mobility LLC v. Concepcion***, 131 S. Ct. 1740, 1745

(2011). The "primary substantive provision of the Act," *id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), establishes that an agreement to arbitrate a dispute "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements,'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24), and courts therefore must "rigorously enforce agreements to arbitrate," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1986) (quoting *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985) (internal quotation mark omitted)). The strong federal policy favoring arbitration applies with full force "when a party bound by an agreement raises a claim founded on statutory rights." *Id.*

2. ***Credit Repair Organizations Act (CROA).*** The CROA defines a "credit repair organization" as an organization that provides services intended to "improv[e] any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3)(A)(i).[1]

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[1] Petitioners have consistently denied that they are, as a threshold matter, "credit repair organizations" subject to the CROA. Indeed, Synovus Bank, as a depository institution, is explicitly exempt from the statutory definition of "credit repair organization." *See* 15 U.S.C. § 1679a(3)(B)(iii). Neither court below ruled on this issue, and it is thus not before this Court. For the reasons explained in this brief, that question should be decided by an arbitrator rather than a court, as the arbitration agreement between the parties expressly requires, J.A. 63. *See Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1256 (11th Cir. 2009).

The statute aims "to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services," and "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations." *Id.* § 1679(b). Congress implemented that purpose by (a) granting credit repair consumers certain specified protections and rights, (b) deeming those protections and rights nonwaivable and prohibiting attempts to secure any waiver, and (c) providing for private and administrative enforcement of the statute.

a. After preliminarily setting forth the statutory findings, purpose, and definitions, the CROA contains an initial group of substantive provisions defining the protections and rights granted to consumers. For instance, the CROA prohibits credit repair organizations from making false or misleading statements or engaging in fraudulent acts, or from receiving payment before completion of particular services. 15 U.S.C. § 1679b(a)-(b). The CROA further bars a credit repair organization from performing any service without a written contract containing, *inter alia*, (i) the terms and conditions of payment, and (ii) a detailed description of the services to be performed. *Id.* § 1679d. The CROA also grants consumers the right to "cancel any contract with any credit repair organization without penalty or obligation" within 3 business days of its execution. *Id.* § 1679e(a).

Additionally, the CROA requires a credit repair organization to provide consumers with a separate written statement disclosing certain of their "rights." 15 U.S.C. § 1679c. That disclosure provision does

not itself enact any of the "rights" subject to its disclosure mandate; rather, the CROA and related statutes elsewhere establish each of the underlying rights. Accordingly, the disclosure provision requires a credit repair organization to inform consumers, "You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly." *Id.* A separate provision establishes the associated right. *Id.* § 1681i(a). Similarly, the disclosure provision requires advising consumers, "You have a right to obtain a copy of your credit report from a credit bureau" under certain conditions, *id.* § 1679c(a), a right set forth elsewhere, *id.* § 1681j(b)-(f). The disclosure provision also requires advising consumers of the aforementioned right, established in Section 1679e, "to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it." *Id.* § 1679c(a).

Of particular salience, the disclosure provision prescribes that the written statement to consumers state: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." *Id.* § 1679c(a). The "right to sue" described in the disclosure provision is separately established by the CROA's "civil liability" provision. *Id.* § 1679g(a). The latter provision states: "Any person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount determined under a framework set forth in the statute. *Id.*

b. Following the provisions setting forth consumer rights and protections, the CROA contains a section entitled "Noncompliance with this subchap-

ter [i.e., the CROA]." 15 U.S.C. § 1679f. Section 1679f contains an anti-waiver provision, which states: "Any waiver by any consumer of any protection provided by or any right of the consumer under" the CROA "shall be treated as void," and "may not be enforced by any Federal or State court or any other person." *Id.* § 1679f(a). Relatedly, Section 1679f deems it a violation of the CROA for "any person" to make "[a]ny attempt . . . to obtain a waiver from any consumer of any protection provided by or any right of the consumer under [the CROA]." *Id.* § 1679f(b).

c. The third and final set of provisions of the CROA govern the statute's enforcement. Those provisions include Section 1679g, the aforementioned civil liability provision, which establishes that "[a]ny person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount determined under a statutorily prescribed framework. 15 U.S.C. § 1679g(a). The civil liability provision allows for recovery of both compensatory and punitive damages for CROA violations. *Id.* § 1679g(a)(1)-(2).

The CROA's enforcement provisions also allow for federal and state administrative enforcement. 15 U.S.C. § 1679h. The CROA invests the Federal Trade Commission with federal enforcement authority and establishes that, for purposes of the FTC's authority, "any violation of any requirement or prohibition imposed under [the CROA] shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act." *Id.* § 1679h(b)(1). The FTC possesses broad authority to bring enforcement actions against violators of the Act. *Id.* § 1679h(b)(2). States, with

certain limitations, also have authority to bring actions for violations of the CROA seeking damages and injunctive relief. *Id.* § 1679h(c).

B. Factual And Procedural Background

1. Petitioner CompuCredit marketed and serviced a credit card under the brand name Aspire Visa. Pet. App. 3a. Petitioner Synovus Bank (known at the time as Columbus Bank and Trust) issued the Aspire Visa card. Pet. App. 3.

Respondents each applied for and received an Aspire Visa card. Before obtaining the card, respondents agreed that any dispute arising from or related to their credit card account would be arbitrated. In particular, respondents received a mailing entitled "Pre-Approved Acceptance Certificate," which stated, *inter alia*:

> By signing, I request an Aspire Visa card and ask that an account be opened for me. . . . I have read and agree to be bound by the "Summary of Credit Terms" and "Terms of Offer" printed on the enclosed insert, *which insert includes a discussion of arbitration applicable to my account, and is incorporated here by reference.*

J.A. 61 (emphasis added); *see also* Pet. App. 4a, 32a.

The Terms of Offer, in turn, provided:

> IMPORTANT—THE AGREEMENT YOU RECEIVE CONTAINS A BINDING ARBITRATION PROVISION. IF A DISPUTE IS TO BE

> RESOLVED BY BINDING ARBITRATION, YOU WILL NOT HAVE THE RIGHT TO GO TO COURT OR HAVE THE DISPUTE HEARD BY A JURY, TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PERMITTED UNDER THE CODE OF PROCEDURE OF THE NATIONAL ARBITRATION FORUM ("NAF") OR TO PARTICIPATE AS PART OF A CLASS OF CLAIMANTS RELATING TO SUCH DISPUTE. . . .

J.A. 61-62; *see also* Pet. App. 4a, 32a-33a.

Finally, the Bank Credit Card Agreement provided:

> Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, *will be resolved by binding arbitration* . . . . Upon such an election, *neither you nor we will have the right to litigate in court the claim being arbitrated*, including a jury trial . . . .

J.A. 62-63 (emphasis added); *see also* Pet. App. 5a, 33a. And that Agreement further stated:

> The term 'Claims' covered by this Arbitration Provision is to be given the broadest possible meaning, and includes by way of example and without

> limitation . . . Claims between you and our parent corporations, wholly or majority owned subsidiaries, affiliates, predecessors, successors, assigns, agents, independent contractors, employees, officers, directors or representatives arising from your Account or this Agreement[,] and . . . Claims regarding the validity, enforceability or scope of this Arbitration Provision or this entire Agreement.

J.A. 63.

2. On October 24, 2008, respondents filed a complaint against petitioners alleging that petitioners had violated the CROA in various ways in connection with the Aspire Visa card.[2] J.A. 47-58.[3] Respondents purported to represent a nationwide class of holders of the Aspire Visa card. J.A. 43.

a. On December 30, 2008, petitioners moved the district court to compel arbitration of respondents' CROA claims based on the FAA and the mandatory arbitration clause in the parties' contracts. The district court denied the motion, holding that CROA claims are not subject to arbitration. Pet. App. 30a-45a.

The district court acknowledged the need under the FAA to assess the arbitrability of CROA claims

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[2] Respondents also alleged violations of California law, which were not subject to the motion to compel arbitration, and are not at issue here.

[3] The referenced complaint is the First Class Action Amended Complaint And Jury Demand, dated November 6, 2008. J.A. 38-60.

"with a healthy regard for the federal policy favoring arbitration." Pet. App. 41a (quoting *Gilmer*, 500 U.S. at 26) (internal quotation mark omitted). The court further explained that this Court "has regularly concluded that statutory claims in a variety of contexts are arbitrable." Pet. App. 41a. In the district court's view, however, the CROA grants consumers a "non-waivable right to sue" in court, rendering respondents' arbitration agreements void and unenforceable. Pet. App. 41a-45a. Petitioners appealed pursuant to the FAA, 9 U.S.C. § 16(a)(1)(B).

b. A divided panel of the court of appeals affirmed. Pet. App. 1a-29a. The panel majority acknowledged the FAA's "'liberal federal policy favoring arbitration agreements.'" Pet. App. 7a (quoting *Gilmer*, 500 U.S. at 25). The majority further explained that a party must adhere to an arbitration agreement "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Pet. App. 8a (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (internal quotation marks omitted). Accordingly, the "burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies." Pet. App. 8a (citing *Gilmer*, 500 U.S. at 26).

Nevertheless, the majority found that the "plain language of the CROA" compels the conclusion that Congress precluded arbitration of CROA claims. Pet. App. 17a. The majority reasoned that the CROA's disclosure provision refers to a "right to sue," and that the "plain meaning of the phrase 'right to sue' . . . involves the right to bring an action in a court of law," not in arbitration. Pet. App. 10a.

The majority found it insignificant that the "right to sue" mentioned in the disclosure provision is established, not in that provision, but instead in the CROA's civil liability provision, 15 U.S.C. § 1679g, the language of which concededly does not preclude submission of a CROA claim to arbitration. Pet. App. 13a.

The majority also relied on the CROA's anti-waiver provision, 15 U.S.C. § 1679f(a). Pet. App. 14a-15a. That provision, the majority believed, "invalidates any waiver of the right to sue" in a court, rendering the arbitration clause in the Aspire Visa agreement unenforceable. Pet. App. 15a. The majority acknowledged that, because the anti-waiver provision bars enforcement of a waiver of CROA rights by a "court *or any other person*," 15 U.S.C. § 1679f(a) (emphasis added), the provision necessarily contemplates the resolution by an arbitrator of disputes between a credit repair organization and a consumer. Pet. App. 15a. But in the majority's view, that provision contemplates arbitration only when a credit repair organization initiates an arbitration proceeding against a consumer, not when a consumer files a lawsuit in court against a credit repair organization: According to the majority, the "'any other person' language of Section 1679f(a) assures that [the CROA's] rights and protections would be preserved in an arbitration instituted by a credit repair organization" in, for example, a collection proceeding. Pet. App. 15a.

c. Judge Tashima dissented. Pet. App. 23a-29a. He explained that, while the CROA's disclosure provision mentions a "right to sue," the provision "does not purport to create any substantive rights, includ-

ing the right to sue. Rather, its sole purpose is to set forth a disclosure statement to be communicated verbatim to consumers." Pet. App. 25a. "The 'right to sue' listed in § 1679c(a)," Judge Tashima observed, "is provided for in 15 U.S.C. § 1679g, which establishes civil liability for violations of the CROA." Pet. App. 26a. While the civil liability provision generally confers "the 'right to sue' a credit repair organization which violates the CROA," Judge Tashima explained, the statute nowhere "mandate[s] a judicial forum for enforcement of the CROA's substantive provisions." Pet. App. 26a. Moreover, "the mere mention of a 'right to sue' does not necessarily mean the right to sue *in court*, especially given the lack of other statutory language supporting this interpretation." Pet. App. 27a.

Judge Tashima rejected the majority's reliance on the CROA's anti-waiver provision, Section 1679f. The language of that provision, Judge Tashima observed, "indicates that Congress intended that CROA claims . . . be enforceable outside a judicial forum." Pet. App. 26a. That is because the provision prohibits enforcement of any waiver of CROA's protections or rights "by any Federal or State court *or any other person*." Pet. App. 26a (quoting 15 U.S.C. § 1679f(a)). "By including 'or any other person' in the same sentence that lists Federal and State courts as appropriate fora for CROA claims," Judge Tashima explained, "Congress clearly indicated that arbitrators, mediators, and other third parties may decide CROA claims." Pet. App. 27a.

SUMMARY OF ARGUMENT

This Court's "cases place it beyond dispute that the FAA was designed to promote arbitration," and the Court has "repeatedly described the Act as" establishing "a liberal federal policy favoring arbitration agreements." *AT&T Mobility*, 131 S. Ct. at 1749 (quotation omitted). Congress will be found to have overridden that strong federal policy, and to have precluded arbitration of claims under a particular statute, only if it makes its intention unmistakably clear. The burden to make that showing rests with the party opposing arbitration.

There is no basis for concluding that the CROA precludes enforcement of arbitration agreements, let alone that it does so with sufficient clarity to overcome the FAA. The CROA contains a civil liability provision allowing private suits for violation of its substantive protections; but neither that provision, nor any other CROA provision, refers to arbitration, much less expressly precludes it. In that regard, the CROA stands in stark contrast with numerous provisions in the United States Code in which Congress has expressly precluded arbitration in direct and unambiguous terms—for instance, by specifying that "no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section." 12 U.S.C. § 5567(d)(2). Those provisions demonstrate Congress's full awareness of the FAA's presumption favoring arbitration and of the corresponding need to speak clearly to overcome that presumption. Congress's conspicuous failure in the CROA to include any comparable language compels the conclusion

that claims under the CROA are subject to arbitration.

In concluding otherwise, the Ninth Circuit relied on two CROA provisions: the disclosure provision and the anti-waiver provision. The Ninth Circuit reasoned that the disclosure provision adverts to a "right to sue," which the court believed established an entitlement to a judicial (as opposed to arbitral) forum. The Ninth Circuit further reasoned that the supposed "right to sue" exclusively in court is a "right of the consumer" shielded from waiver under the anti-waiver provision. The Ninth Circuit's reasoning is unpersuasive for a host of reasons.

First, even assuming, *arguendo*, that the "right to sue" language in the disclosure provision creates an exclusively judicial remedy, nothing in the CROA's anti-waiver provision prevents parties from agreeing to an arbitral forum through a valid arbitration agreement. The anti-waiver provision prevents the waiver only of substantive rights under the CROA, not procedural rights such as the ostensible "right to sue in court."

Reading the anti-waiver provision to preclude waiver of the purported right to sue in court could lead to results that Congress would not have intended. The CROA deems it a substantive violation of the statute to *attempt* to obtain a waiver of "any right of the consumer." The Ninth Circuit's approach thus could mean that merely *tendering* a contract including an arbitration clause would constitute a violation of federal law, raising the prospect of private damages actions and FTC enforcement actions. Indeed, the Ninth Circuit's reasoning could

preclude enforcement of garden-variety settlement agreements under which plaintiffs waive their right to bring future suits under the CROA: any such settlement agreement would constitute an unenforceable waiver of the "right to sue" in court. In fact, an *offer* of settlement could constitute an attempt to obtain an illicit waiver, and hence a violation of federal law. There is no warrant for reading the anti-waiver clause to bring about those extraordinary results.

What is more, the text of the anti-waiver provision affirmatively contemplates arbitration. The provision specifically says that covered waivers "may not be enforced by any Federal or State court or *any other person*," making clear that Congress fully expected arbitrators to have a role in enforcing the CROA. If Congress counterintuitively sought to foreclose enforcement of arbitration agreements in a provision that affirmatively contemplates arbitration, Congress would have addressed the issue explicitly and unambiguously. Reading the anti-waiver provision to pertain solely to the CROA's substantive rights also would be consistent with the general structure of the CROA, and with the prevailing construction of the analogous anti-waiver provision in the ADEA. There is no basis to construe the CROA's anti-waiver provision any differently.

Finally, reading the anti-waiver provision in that manner would be consistent with the strong federal presumption in favor of arbitration. Indeed, the CROA was enacted well after this Court had repeatedly recognized that presumption and the associated need to resolve any doubts concerning arbitration in favor of enforcing arbitration agreements. Accordingly, even if there were any doubts concerning the

proper interpretation of the CROA's anti-waiver provision, those doubts must be resolved in favor of arbitration.

Second, the Ninth Circuit also erred as an antecedent matter in assuming that the "right to sue" language in the disclosure provision establishes an entitlement to an exclusively judicial forum. The disclosure provision does not itself create any "right to sue," but uses that language in reference to the CROA's civil liability provision. The latter provision thus is the appropriate place to look when determining the scope of the CROA's "right to sue." The civil liability provision does not create an exclusively judicial remedy, instead providing generally for liability for CROA violations without regard to the forum. And even if the "right to sue" language were the appropriate focus of the inquiry, to "sue" is to initiate a legal process for resolving a claim, and that understanding encompasses arbitration, particularly when considered in light of the need under the FAA to construe the CROA to accommodate arbitration rather than to preclude it. The CROA's silence concerning the forum for vindication of the statute's substantive rights dictates enforcing the parties' election of an arbitral rather than a judicial forum.

ARGUMENT

The FAA establishes a strong federal policy favoring enforcement of agreements to arbitrate claims arising under federal statutes. Nothing in the terms of the CROA overrides that long-settled policy. When Congress intends to negate the FAA and preclude arbitration of claims under a particular statute, Congress says so explicitly and unambiguously

in the terms of the statute, as it has done in a number of other statutes. The CROA, in stark contrast, contains no reference to the subject of arbitration. The sole conclusion to be drawn from that congressional silence—particularly in light of the FAA and this Court's precedents—is that Congress did not intend to preclude arbitration of CROA claims.

I. The FAA Establishes A Strong Presumption Favoring Enforcement Of Agreements To Arbitrate Statutory Claims

Congress enacted the FAA "in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility*, 131 S. Ct. at 1745. Section 2 of the FAA, the statute's operative provision, states that a "written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

"Section 2 embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Because the FAA establishes a "liberal federal policy favoring arbitration agreements," *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000) (internal quotation marks omitted), courts must "rigorously enforce agreements to arbitrate," *McMahon*, 482 U.S. at 226 (internal quotation marks omitted). *See AT&T Mobility*, 131 S. Ct. at 1749. And the liberal federal policy favoring enforcement of arbitration agreements fully ap-

plies "when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 220.

To be sure, Congress retains the power to negate the FAA's strong presumption in the terms of a particular statute, so as to preclude enforcement of agreements to arbitrate claims arising under that statute. But Congress will be found to have set aside the FAA's policy favoring arbitration of statutory claims only if it makes that intention unmistakably clear in the statute. It is thus well-settled that "[t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue," *McMahon*, 482 U.S. at 227, and the analysis must be guided by a "healthy regard for the federal policy favoring arbitration," *Gilmer*, 500 U.S. at 26 (internal quotation marks omitted).

The FAA's presumption favoring arbitration is so strong that, in the past 25 years, this Court has not once denied enforcement of an agreement to arbitrate a federal statutory claim. *See, e.g.*, *Green Tree*, 531 U.S. 79 (Truth in Lending Act claims are subject to arbitration); *Gilmer*, 500 U.S. 20 (Age Discrimination in Employment Act claims subject to arbitration); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act actions subject to arbitration); *McMahon*, 482 U.S. 220 (Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act claims subject to arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (federal antitrust claims subject to arbitration). There is no ba-

sis to reach any different conclusion with regard to claims under the CROA.

II. Nothing In The Terms Of The CROA Precludes Enforcement Of An Agreement To Arbitrate Claims Under The Statute

Any intent by Congress to overcome the FAA's presumption favoring arbitration in a particular statute must be apparent from the statute's "text or legislative history," or "from an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227 (internal quotation marks omitted). This case turns exclusively on the CROA's text. Even assuming legislative history could alone afford a basis for negating the FAA, neither respondents nor the Ninth Circuit have identified any legislative history addressing the enforceability of agreements to arbitrate CROA claims. Nor have they suggested any "inherent conflict between arbitration and the statute's underlying purposes." *Id.* Rather, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637; *see also* Pet. App. 28a (Tashima, J., dissenting). Consequently, the sole question for the Court is whether the text of the CROA precludes arbitration with sufficient clarity to override the operation of the FAA.

The CROA's text admits of only one answer. The statutory terms contain no reference to the subject of arbitration—there is no mention of the word "arbitration" in any form—much less the enforceability of agreements to arbitrate claims under the statute.

The CROA's terms thus fall far short of "explicitly preclud[ing] arbitration or other nonjudicial resolution of claims," *Gilmer*, 500 U.S. at 29, as would be necessary to address the matter with sufficient clarity to overcome the FAA's strong presumption favoring arbitration. The only plausible conclusion to draw from Congress's silence is that it had no intention to preclude arbitration of CROA claims.

That is particularly the case because, when Congress in fact desires to override the FAA and deny enforcement of arbitration agreements, it does so expressly and unambiguously. The CROA stands in stark contrast with numerous statutes in which Congress specifically and directly bars enforcement of agreements to arbitrate statutory claims:

- 7 U.S.C. § 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section");
- 10 U.S.C. § 987(e)(3) ("It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which . . . the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute");
- 12 U.S.C. § 5567(d)(2) ("Except as provided under paragraph (3), and notwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section");

- 15 U.S.C. § 1226(a)(2) ("Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy");
- 15 U.S.C. § 1639c(e)(1) ("No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction");
- 18 U.S.C. § 1514A(e)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section");
- American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(d)(2) ("Except as provided under paragraph (3), no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising under this section").

Alternatively, Congress sometimes references the FAA by its terms and dictates its inapplicability. *See, e.g.*, 22 U.S.C. § 290k-11(a) ("Federal Arbitration Act . . . shall not apply to enforcement of awards rendered pursuant to the Convention"); 22 U.S.C. § 1650a(a) ("Federal Arbitration Act . . . shall not

apply to enforcement of awards rendered pursuant to the [C]onvention"). Congress also may expressly delegate authority to preclude arbitration of statutory claims to an agency charged with administering the statute. *See, e.g.*, 12 U.S.C. § 5518(b) ("The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement . . . providing for arbitration of any future dispute between the parties, if the Bureau finds" it "is in the public interest and for the protection of consumers"); 15 U.S.C. § 78o(o) ("The [Securities and Exchange] Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors").

All of those various provisions manifest Congress's keen awareness that it acts against the backdrop of the FAA's strong presumption favoring arbitration.[4] Congress thus speaks directly and unambi-

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[4] Congress also routinely demonstrates that awareness in proposed legislation. *See, e.g.*, Non-Federal Employee Whistleblower Protection Act of 2011, S. 241, 112th Cong. § 2 (bill to amend 41 U.S.C. § 4705(2)(d)(2) to ban pre-dispute arbitration clauses as to suits against government employees who are protected as "whistleblowers"); Service Members Access to Justice Act of 2009, H.R. 1474, 111th Cong. § 3(a) (bill to amend the Uniformed Service Employment and Reemployment Rights Act of 1994 to make agreements to arbitrate claims under that Act nonenforceable); Mortgage Reform and Anti-Predatory Lending

guously when it intends to deny enforcement of arbitration agreements.

"Such language is notably absent from the" CROA. *Bd. of Trustees v. Roche Molecular Sys.*, No. 09-1159, __ S. Ct. __, slip op. at 8 (June 6, 2011); *see W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 88-92 (1991) (holding that the term "attorney's fees" in a fee-shifting statute does not include expert fees because a consistent "record of statutory usage" demonstrates that, when Congress intends to include expert fees in a fee-shifting provision, it does so explicitly). Especially when considered in light of Congress's demonstrated practice of expressly precluding arbitration when intending to do so, the conspicuous absence of any such specification in the CROA—indeed, of any mention of arbitration at all—compels giving effect to the "liberal federal pol-

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Act, H.R. 1728, 111th Cong. § 206(a) (bill to amend the Truth In Lending Act to prohibit arbitration agreements in certain mortgage loans and other credit agreements); Automobile Arbitration Fairness Act of 2008, H.R. 5312, 110th Cong. § 2 (bill to amend the FAA to ban predispute arbitration agreements arising from automobile sale or lease contracts); Fair Contracts for Growers Act of 2007, S. 221, 110th Cong. § 2 (bill to limit applicability of predispute arbitration agreements for livestock and poultry growers); Home Ownership Preservation and Protection Act of 2007, S. 2452, 110th Cong. § 706 (bill to amend the Truth In Lending Act to bar arbitration provisions in home mortgage loan documents); Borrower's Bill of Rights Act, H.R. 1643, 109th Cong. § 5 (bill to amend the Truth In Lending Act to prohibit predispute arbitration clauses in agreements for loans or extension of credit); Fair and Responsible Lending Act, H.R. 4471, 109th Cong. § 104 (bill to amend the Truth In Lending to preclude arbitration of certain claims arising out of home loan transactions).

icy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25 (internal quotation marks omitted).

III. The Ninth Circuit Fundamentally Erred In Discerning In The CROA A Clear Congressional Intention To Preclude Arbitration

Notwithstanding the absence of any mention of the subject of arbitration in the CROA's text, the Ninth Circuit concluded that Congress addressed the matter with sufficient clarity in "the plain language of the CROA" to negate the FAA and preclude arbitration of CROA claims. Pet. App. 17a. The Ninth Circuit's analysis is deeply flawed.

The Ninth Circuit's reasoning proceeded in two steps. First, the court relied on the requirement under the CROA's disclosure provision to advise consumers that they have a "right to sue" for CROA violations. 15 U.S.C. § 1679c(a). Looking to that disclosure provision alone, wholly without regard to the separate provision establishing the underlying "right to sue," the Ninth Circuit concluded that the CROA unambiguously prescribes a right to a judicial rather than arbitral forum. Second, the Ninth Circuit relied on the CROA's non-waiver provision. *Id.* § 1679f(a). The court believed that the ostensible right-to-sue-in-court is one of the consumer rights as to which the non-waiver provision prohibits any waiver, including through an arbitration agreement.

While both of those steps are necessary to the Ninth Circuit's conclusion, neither withstands scrutiny. Even assuming that the CROA creates a "right to sue" in court, nothing in the CROA overrides the strong presumption that consumers can waive that

purported right by entering into a valid arbitration agreement. The Ninth Circuit was also wrong at the threshold in believing that the CROA establishes a "right to sue" exclusively in court, particularly given the need under the FAA to read the CROA to allow arbitration rather than to preclude it.

As an overarching matter, moreover, the highly elliptical manner through which the CROA supposedly demonstrates an intention to override the FAA's strong presumption favoring arbitration is decidedly out of step with Congress's established practice of specifying such an intention through express language directly addressing arbitration. There is no cause for concluding that Congress in the CROA would have "supersed[ed] the [FAA] in such a backhanded way." *Bd. of Trustees*, slip op. at 12 n.5. If Congress in fact intended to preclude arbitration of CROA claims, it would have said so far more directly, as it repeatedly has done in other statutes.

A. The CROA Does Not Preclude Parties From Agreeing To A Non-Judicial Forum Through A Valid Arbitration Agreement

The Ninth Circuit held that the CROA's disclosure provision establishes a "right to sue" exclusively in court, and further, that the supposed right to sue in court is non-waivable by virtue of the CROA's anti-waiver provision. Even assuming that the "right to sue" language in the disclosure provision establishes an entitlement to judicial resolution of CROA claims—which it does not, *see infra* Part III.B—the Ninth Circuit erred in concluding that the CROA's anti-waiver provision bars enforcement of a

waiver of that ostensible right through an arbitration agreement.

The CROA's anti-waiver provision treats as void "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under" the CROA. 15 U.S.C. § 1679f(a). That provision precludes a waiver only of the CROA's *substantive* consumer protections and rights—for example, the protection against misleading statements by credit repair organizations, 15 U.S.C. § 1679b. The anti-waiver provision does not pertain to a waiver of the *procedural* "right to sue" (by hypothesis, exclusively in court) a credit repair organization.

The Ninth Circuit's contrary view, if accepted, would render arbitration agreements unenforceable under a number of statutes. *Any* cause of action in the United States Code could be characterized as a "right to sue."[5] Many statutes providing for a cause

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[5] Indeed, the statutes that this Court has held to be subject to arbitration, *see supra* Part I, all provide causes of action that are properly described as a "right to sue." *See* 15 U.S.C. § 15(a) (Sherman Act) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ."); 15 U.S.C. § 77*l* (Securities Act) ("Any person who [violates particular provisions concerning securities] shall be liable . . . to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction . . . ."); 15 U.S.C. § 1640(e) (Truth In Lending Act) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction . . . ."); 18 U.S.C. § 1964(c) (RICO) ("Any person injured in his business or property by reason of a violation of [the RICO statute] may sue therefor in any appropriate United States district court . . . ."); 29 U.S.C. § 626(c)(1) (ADEA) ("Any person aggrieved may bring a civil action in any court of competent

of action also include an anti-waiver provision resembling the one in the CROA. *See, e.g.*, 29 U.S.C. § 626(f)(1) ("An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. [A] waiver may not be considered knowing and voluntary unless at a minimum . . . (C) the individual does not waive rights or claims that may arise after the date the waiver is executed."); 29 U.S.C. § 2005(d) ("The rights and procedures provided by this chapter may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this chapter."); 21 U.S.C. § 399d(c)(2) ("The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment."); 49 U.S.C. § 20109(h) (same); 49 U.S.C. § 31105(g) (same). Under the Ninth Circuit's reasoning, each of these provisions would prohibit enforcement of an arbitration agreement, on the theory that an agreement to arbitrate effects a waiver of a cause of action in court—i.e., a "right to sue."[6]

In fact, however, the CROA's anti-waiver provision bars waiver of the statute's substantive rights and protections, not procedural rights like the ostensible "right to sue" in court. The anti-waiver provi-

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jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318 (2007) ("Section 10(b) [of the Exchange Act] . . . affords a right of action to purchasers or sellers of securities injured by its violation.").

[6] The Ninth Circuit itself has held that one of these provisions—29 U.S.C. § 2005(d)—does not preclude enforcement of arbitration agreements. *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 880-82 (9th Cir. 1992).

sion thus does not preclude enforcement of agreements to arbitrate CROA claims.

1. The interaction between the terms of the anti-waiver provision and the terms of closely related provisions strongly supports that conclusion. The anti-waiver provision renders void "[a]ny waiver by any consumer of any protection provided by or *any right of the consumer* under" the CROA. 15 U.S.C. § 1679f(a) (emphasis added). The immediately ensuing provision states that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or *any right of the consumer* under [the CROA] shall be treated as a violation of [the CROA]." *Id.* § 1679f(b) (emphasis added). The provisions are parallel in scope, both addressing waivers of a "right of the consumer" under the CROA. If a "right of the consumer" qualifies as a "right" as to which the anti-waiver provision applies, it presumably also constitutes a "right" as to which any "attempt" to obtain its waiver would constitute a violation of the CROA.

That understanding forecloses concluding that Congress intended the anti-waiver provision to encompass the "right to sue." If the anti-waiver provision precluded waiver of the "right to sue," it could then be a violation of the CROA—potentially subject to punitive damages and FTC enforcement—merely to *offer* a consumer the option of entering into an arbitration agreement, or even to offer a standard agreement to settle CROA claims. Particularly absent a clear statement, there is no cause to believe Congress could have intended those unprecedented results.

a. If an agreement to arbitrate CROA claims qualified as a "waiver . . . of . . . any right of the consumer under" the CROA for purposes of the anti-waiver provision, 15 U.S.C. § 1679f(a), merely offering a consumer the option to enter into an arbitration agreement could then constitute an unlawful "attempt . . . to obtain a waiver . . . of . . . any right of the consumer under" that Act. *Id.* § 1679f(a), (b). The mere tender of an arbitration clause in a credit repair agreement thus could render the credit repair organization liable under the CROA, subjecting the organization to damages liability in a private action as well as an FTC enforcement action.

It is one thing to declare an arbitration agreement unenforceable, as Congress has done in certain provisions through explicit and direct language. *See supra* Part II. It is quite another to conclude that Congress intended to deem the mere existence of an arbitration agreement—indeed, the mere *offer* to enter into an arbitration agreement—a *violation of federal law* subject to damages liability and administrative enforcement. Congress would not render it a violation of federal law merely to present to a consumer the *option* to enter into an arbitration agreement without saying so unambiguously. There is no warrant for reading the CROA's anti-waiver provision in a manner that could bring about that extraordinary result, particularly given the FAA's strong policy favoring arbitration.

b. What is more, applying the anti-waiver provision to the purported "right to sue" in court could even render a garden-variety *settlement agreement* unenforceable and unlawful. An agreement to settle a dispute, either before or after the filing of suit, is

an agreement to waive the "right to sue" in exchange for something of value. This Court in fact has expressly compared waivers of the right to sue in court through an arbitration agreement with waivers of the same right through a settlement agreement: the Court has explained that, just as "parties to an arbitration agreement [can] waive the right to have their . . . claims tried in federal court and agree to arbitrate the claims," *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375 (1996) (citing *McMahon*, 482 U.S. at 227-28), "litigants ought also to be able to waive, or 'release,' the right to litigate . . . claims in a federal forum as part of a settlement agreement," *id.*

Because a settlement agreement necessarily rests on a waiver of the right to sue, the Ninth Circuit's reading of the anti-waiver provision could mean that an agreement to settle CROA claims is unenforceable. The Ninth Circuit's reading in fact could go further, rendering even the mere *offer* of a settlement a *violation of the CROA*. As explained, Section 1679f not only renders waivers of "any right of the consumer" void, but also makes any "attempt" to obtain such a waiver a substantive violation of the Act, raising the prospect of damages liability and administrative enforcement action by the FTC. There could be no basis for concluding that Congress intended to make it a violation of federal law to offer to settle a CROA case. The better course is to recognize that the anti-waiver provision applies to substantive rights and protections, not procedural rights like the "right to sue."

2. The text of the CROA's anti-waiver provision demonstrates that Congress affirmatively contemplated arbitration of CROA claims. The provision

says that, "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under [the CROA] . . . may not be enforced by any Federal or State court *or any other person*." 15 U.S.C. § 1679f(a) (emphasis added). The italicized language confirms Congress's intent that not only federal and state courts but also "other persons"—e.g., arbitrators—would enforce the CROA. A provision that affirmatively contemplates arbitration cannot rationally be read to preclude it.

The Ninth Circuit did not disagree that the "any other person" language referred to arbitrators. Nonetheless, the majority reasoned, "it is foreseeable that a credit repair organization would institute arbitration proceedings against a consumer for collection of the organization's fees under its contract with the consumer," in which "one of the other nonwaivable consumer rights or protections [under the CROA] could arise." Pet. App. 15a. Consequently, the majority submitted, "[t]he 'any other person' language of Section 1679f(a) assures that these rights and protections would be preserved in an arbitration instituted by a credit repair organization or debt collection agency." Pet. App. 15a.

The far more natural interpretation is simply that Congress generally expected arbitrators to adjudicate CROA claims, and Congress wanted to make clear that waivers of *substantive* rights and protections would be unenforceable in arbitration no less than in court. And that reading of the "any other person" language, unlike the Ninth Circuit's strained interpretation, squares with the strong federal policy favoring enforcement of arbitration agreements. Congress's demonstrated practice of

employing express and unambiguous language when intending to override that policy (*see supra* Part II) has particular salience in the context of the "any other person" language: if Congress intended to preclude enforcement of arbitration agreements in a provision that *itself contemplates arbitration*, it would take special care to do so directly and unmistakably. Congress's failure to do so in the CROA renders the Ninth Circuit's reading particularly implausible.

3. The placement of the anti-waiver provision in the statute further supports the conclusion that it applies to the CROA's substantive rights, but not to the procedural "right to sue." *See Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme").

The CROA consists of three sets of operative provisions. *First*, after a preliminary statement of the statutory purposes and definitions, 15 U.S.C. §§ 1679, 1679a, the CROA sets forth the substantive rights and protections granted to consumers, including, *inter alia*: a prohibition against false or misleading statements or acts, *id.* § 1679b; the requirement to give consumers a written, verbatim disclosure of rights and protections granted elsewhere, *id.* § 1679c; and the establishment of a consumer's unfettered right of cancellation within three business days, *id.* § 1679e(a). *Second*, the CROA includes a section containing the anti-waiver provision and the prohibition against attempts to secure a waiver of CROA rights. *Id.* § 1679f. *Third*, the CROA sets out the methods through which it is to be enforced—by

private action, *id.* § 1679g, and by the FTC (and in some circumstances by state bodies), *id.* § 1679h.

In short, the CROA creates consumer rights and protections, deems them non-waivable, and then provides the means for their enforcement. Congress's placement of the anti-waiver provision directly after the substantive-rights-creating provisions, but before the procedural enforcement provisions, reinforces the understanding that the anti-waiver provision pertains to the substantive rights that precede it, not the civil liability provision or other procedural provisions that follow it.

4. That conclusion draws additional support from this Court's decisions. The Court has long recognized the distinction between substantive rights and the forum for vindicating those rights. As the Court has explained, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637.

Consistent with that understanding, this Court has previously recognized that a provision precluding waiver of "rights" does not preclude enforcement of an arbitration agreement. Shortly before this Court held in *Gilmer* that the ADEA does not preclude arbitration of claims under that statute, Congress enacted the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101–433 (1990). The OWBPA amended the ADEA by adding a provision stating that: "An individual *may not waive any right* or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in para-

graph (2), a waiver may not be considered knowing and voluntary unless at a minimum . . . (C) the individual *does not waive rights* or claims that may arise after the date the waiver is executed." 29 U.S.C. § 626(f)(1) (emphasis added).

The *Gilmer* Court specifically quoted that anti-waiver provision and observed that Congress had "recently enacted" it. 500 U.S. at 28 n.3. If the ADEA's cause of action—which certainly qualifies as a "right to sue"—were considered a "right" for purposes of the ADEA's anti-waiver provision, the latter provision would prohibit enforcement of an arbitration agreement. Yet this Court concluded that "Congress . . . did not explicitly preclude arbitration or other nonjudicial resolution of claims, *even in its recent amendments to the ADEA*." *Id.* at 29 (emphasis added). And every court of appeals to have considered the issue has held that the reference to "rights" in the OWBPA's anti-waiver provision includes only substantive rights, and does not preclude enforcement of arbitration agreements.[7]

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[7] *See Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1373 n.15 (11th Cir. 2005) ("OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum." (quotation omitted)); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 13 (1st Cir. 1999) (holding that "any right" under the OWBPA applies "to substantive rights, or, at any rate, not to the right to proceed in court rather than in arbitration"); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 181 (3d Cir. 1998), *abrogated on other grounds*, *Green Tree*, 531 U.S. 79 (OWBPA is "limited to the waiver of substantive rights under the ADEA"); *Williams v. CIGNA Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995) ("[T]he OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum."); *see also Saari*, 968 F.2d at 880-82 (holding that 29

Just as the ADEA's anti-waiver provision does not encompass the "right to sue" under the ADEA's express cause of action, the CROA's anti-waiver provision does not encompass the "right to sue" under that statute's civil liability provision. In both statutes, the anti-waiver provision pertains only to substantive rights. And as this Court has explained, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. That is precisely what respondents in this case chose to do. The FAA requires courts to enforce that choice.

5. To the extent there is any remaining doubt concerning whether the CROA's anti-waiver provision precludes enforcement of an arbitration agreement, that doubt must be resolved in favor of arbitration. As this Court has instructed, the scope of the CROA's anti-waiver provision "must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). And "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. There is no basis for concluding that the CROA's anti-waiver provision bars arbitration, much less for concluding that it does so with sufficient clarity to overcome the requirement to resolve any doubts in favor of arbitration.

U.S.C. § 2005(d), which says that the "rights and procedures provided by this chapter may not be waived," does not preclude enforcement of arbitration agreements).

Indeed, the CROA was enacted in 1996, over 70 years after the FAA, and well after this Court had repeatedly interpreted the FAA to establish a strong presumption in favor of arbitration. "Congress was, of course, aware of this presumption once it was established by this Court." *Montana v. United States*, 450 U.S. 544, 552 n.2 (1981). Yet there is nothing in the text of the CROA (or even its legislative history) indicating that Congress in fact considered precluding arbitration of CROA claims. "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396, n. 23 (1991) (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)).

B. The CROA Does Not Establish An Exclusively Judicial Remedy

Even if the anti-waiver provision applies to procedural rights like the "right to sue," the CROA does not create a "right" to an exclusively judicial remedy in the first place. A consumer's agreement to arbitrate CROA claims thus does not waive any "right" under that Act.

1. The CROA's disclosure provision requires credit repair organizations to supply a written statement to consumers stating, *inter alia*, "You have a right to sue a credit repair organization that violates the [CROA]." 15 U.S.C. § 1679c(a). Based on that language alone, the Ninth Circuit concluded that the CROA establishes a "right to bring an action in a court of law," not in arbitration. Pet. App. 10a.

The Ninth Circuit's exclusive focus on the "right to sue" language in the disclosure provision disregards the most pertinent statutory text. The

CROA's disclosure provision does not create a "right to sue." Rather, that phrase appears as part of a long series of disclosures that credit repair organizations must present verbatim to consumers. 15 U.S.C. § 1679c(a). The only consumer "right" established by the disclosure provision is a right to be presented with the required written statement. The "right to sue" language in the CROA's disclosure provision thus does not *create* any right, but rather *describes* the cause of action available under a separate provision of the CROA—*viz.*, the civil liability provision, 15 U.S.C. § 1679g. It is therefore *that* provision whose language determines the scope of the "right to sue" under CROA.

The civil liability provision does not purport to create an exclusively judicial remedy. The operative language makes no mention of the forum in which a proceeding may be heard. Instead, the terms simply state that "[a]ny person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount calculated through a prescribed framework. 15 U.S.C. § 1679g(a). Nothing in that provision dictates determining liability in a judicial forum, to the exclusion of an arbitral forum.

To be sure, when the civil liability provision sets forth the method of calculating the amount of any punitive damages, it makes reference to a "court." *Id.* § 1679g(a)(2)(B), (b). That passing reference to a "court" merely reflects Congress's understandable assumption that courts would generally serve as the default venue for the resolution of CROA claims. But when Congress seeks to *mandate* an exclusively judicial forum, it knows how to do so. *See, e.g.*, stat-

utes cited in note 5, *supra*. Congress did not do so here. *See* Pet. App. 26a (Tashima, J., dissenting); *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1255 (11th Cir. 2009); *Gay v. CreditInform*, 511 F.3d 369, 381-83 (3d Cir. 2007).

2. Even if one focuses on the "right to sue" language in the CROA's disclosure provision alone—wholly disregarding the terms of the separate provision creating the underlying cause of action—the CROA does not create a right to an exclusively judicial resolution, and at least does not do so with sufficient clarity to override the FAA. The Ninth Circuit reasoned that "[t]o sue is '[t]o institute a lawsuit against (another party),'" and that "lawsuit"—which the court deemed the equivalent of "suit"—means, according to legal dictionaries, "[a]ny proceeding by a party or parties against another *in a court of law*." Pet. App. 10a (quoting Black's Law Dictionary 905, 1473, 1475 (8th ed. 2004)) (alterations and emphasis in original). The "right to sue" language, the Ninth Circuit thus believed, establishes a right to "institute a lawsuit" in court, not in arbitration. Pet. App. 10a. That analysis is unpersuasive.

To begin with, the "right to sue" language in the disclosure provision is directed to lay consumers, not lawyers. The purpose of that language, and of the written statement required by the disclosure provision more generally, is to afford lay consumers a plain-English description of their various "rights" established elsewhere in the CROA and related statutes. And mainstream (as opposed to legal) dictionaries do not limit the word "sue" to a judicial forum. One dictionary, for example, defines "sue" to mean: "to seek justice or right from (a person) by legal

process." Webster's Ninth New Collegiate Dictionary 1179 (1987); *see also* Funk & Wagnalls Standard College Dictionary 1338 (1973) ("To institute proceedings against for the recovery of some right or the redress of some wrong."); Shorter Oxford English Dictionary 3095 (6th ed. 2007) ("Institute a suit for, make a legal claim to.").

None of those definitions forecloses an understanding of the word "sue" that would encompass arbitration. At a minimum, the term "right to sue" *can* denote the right to initiate a legal process either inside or outside of court. And given the FAA's strong presumption in favor of arbitration, the statutory language should be read to allow arbitration, not to preclude it.

Moreover, respondents should not prevail even under the Ninth Circuit's understanding of the term "right to sue." On the Ninth Circuit's view, the CROA establishes a right to "institute a lawsuit" *in court*. Pet. App. 10a. That right was not infringed in the circumstances of this case, because respondents in fact did "institute a lawsuit" in court. It was only *after* respondents instituted a court action that petitioners elected to use arbitration—as the agreement between the parties allowed them to do, J.A. 62-63—and moved the district court to compel arbitration when respondents resisted the arbitral forum. Respondents thus realized the right the Ninth Circuit believes the CROA affords them.

For those reasons, Congress's reference to a "right to sue" in the CROA's disclosure provision did not dictate the forum in which claims under the CROA would be resolved. The parties here elected

an arbitral forum rather than a judicial one. Nothing in the CROA compels a court to annul that choice. To the contrary, the FAA requires a court to enforce it.

* * * * *

When Congress desires to preclude arbitration with the clarity this Court's precedents require, it knows how to do so. *See supra* Part II. Congress did not do so here. The Ninth Circuit nevertheless held that the CROA precludes arbitration. That holding is inconsistent with the text and structure of that Act, with the "'liberal federal policy favoring arbitration agreements'" established by the FAA, *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24), and with the courts' responsibility to "rigorously enforce agreements to arbitrate," *McMahon*, 482 U.S. at 226 (quoting *Dean Witter*, 470 U.S. at 221 (internal quotation mark omitted)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

AUG 8 - 2011

No. 10-948

IN THE

Supreme Court of the United States

COMPUCREDIT CORP., *et al.*,

Petitioners,

v.

WANDA GREENWOOD, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the plain language of the Credit Repair Organizations Act creates a non-waivable right to sue that forecloses enforcement of a predispute arbitration clause in a consumer contract.

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STATUTORY PROVISIONS INVOLVED

The text of the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679-1679j, is set forth in the Appendix to this Brief, at 1a-16a.

STATEMENT OF THE CASE

A. The Credit Repair Organizations Act

Congress enacted CROA in 1996 to protect consumers against unfair and predatory practices by businesses claiming to assist customers with impaired credit ratings. Hearings in previous sessions had alerted Congress to abusive practices prevalent in this industry, including charging consumers excessive amounts to exercise their rights under existing laws to obtain and dispute information maintained by credit bureaus, and making false and misleading statements (or encouraging consumers to make such statements) in an effort to improve credit scores.[1] The passage of CROA reflected Congress's finding that "[c]ertain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters." 15 U.S.C. § 1679(a)(2). In enacting CROA, Congress sought both "to ensure that prospective buyers of the

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[1] *See, e.g., Amendments to the Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. (1990); *Credit Repair Organizations Act: Hearing on H.R. 458 Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 2d Sess. (1988).

services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services" and "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations." *Id.* § 1679(b).

In CROA, Congress pursued these goals by regulating the relationship between consumers and credit repair organizations. The Act defines a "credit repair organization" as any person who provides "any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of—(i) improving any consumer's credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i)." *Id.* § 1679a(3). Excluded from the definition are 501(c)(3) nonprofit organizations, creditors assisting customers in restructuring debts, and depository institutions. *Id.*

The Act broadly prohibits credit repair organizations from engaging in fraudulent or deceptive conduct, including making false or misleading statements to credit bureaus or creditors, and advising consumers to make such statements. *Id.* § 1679b(a). It outlaws the practice of requiring payment in advance for credit repair services. *Id.* § 1679b(b). It requires credit repair organizations to use written contracts satisfying specific requirements (including specifying all payments that will be required and services to be performed), and it gives consumers a right to cancel any contract with a credit repair organization within three days of signing it. *Id.* §§ 1679d, 1679e. The Act provides that violations of CROA are also violations of the Federal Trade Commission Act, and it gives en-

forcement powers to both the Federal Trade Commission (FTC) and state governmental authorities. *Id.* § 1679h.

Three provisions of CROA are of particular importance to this case. First, the Act expressly creates a private right of action for consumers. *Id.* § 1679g. Specifically, it provides that a credit repair organization that violates any provision of CROA is liable to injured consumers for actual damages, punitive damages, and attorneys' fees, and it specifies the criteria that "the court" is to consider in awarding punitive damages in both "individual actions" and "class actions." *Id.*

Second, to ensure that consumers enter into relationships with credit repair organizations with full knowledge of their rights—including both their rights vis-à-vis credit bureaus under existing laws (which may make paying a credit repair organization for services unnecessary) and their rights under CROA itself—the Act requires that before entering into any contract with a consumer, a credit repair organization must provide a written statement notifying the consumer of her rights. The text, which is dictated by the statute, includes the following statement: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations." *Id.* § 1679c(a). CROA's legislative history shows that this language was added to the draft bill that ultimately became CROA at the suggestion of then-FTC Chairman Daniel Oliver, who urged in a 1988 letter to Representative Frank Annunzio that the bill require disclosures in "simple, non-technical language" in order "to avoid possible obfuscation," and that the dis-

closure specifically inform consumers that they "have the right to sue" under CROA. *Hearing on H.R. 458*, *supra*, at 175.

Third, in keeping with its overall goal of protecting vulnerable consumers against overreaching by credit repair organizations, CROA explicitly prohibits credit repair organizations from requiring (or asking) consumers to sign away their rights under CROA when they seek the assistance of a credit repair organization. 15 U.S.C. § 1679f. Specifically, the Act provides that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." *Id.* § 1679f(a). The Act underscores this prohibition by providing that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter shall be treated as a violation of this subchapter." *Id.* § 1679f(b). And it provides broadly that "[a]ny contract for services which does not comply with the applicable provisions of this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." *Id.* § 1679f(c).

B. The Proceedings in This Case.

This case began when respondents Wanda Greenwood, Ladelle Hatfield, and Deborah McCleese filed a class-action complaint alleging violations of CROA and asserting other claims against petitioner CompuCredit and the predecessor in interest of petitioner Synovus Bank, the Columbus Bank and Trust Company, in the United States District Court for the Northern District of California. J.A. 38-60. The CROA

claims arose out of CompuCredit's marketing of the "Aspire Visa card." CompuCredit targeted the card at consumers with weak credit scores, and it held the card out to consumers as a way to "rebuild your credit," "rebuild poor credit," and "improve your credit rating." J.A. 40. Although CompuCredit told consumers that no deposit was required to take out the card and that they would receive $300 in available credit upon issuance of the card, CompuCredit (and Columbus Trust, the issuing bank) imposed charges, hidden in the fine print of their solicitations, of approximately $185 immediately upon issuance of the card, resulting in a reduction of the available credit under the card to about $115. J.A. 40-41.

The complaint alleged that CompuCredit was a "credit repair organization" because, in marketing the Aspire Visa to "rebuild" and "improve" consumers' credit, it was offering a "service, in return for the payment of money or other valuable consideration, for the express or implied purpose of ... improving any consumer's credit record, credit history, or credit rating." 15 U.S.C. § 1679a(3); J.A. 42, 47. The complaint claimed that CompuCredit had violated CROA in several ways, including:

- Engaging in deceptive conduct in violation of § 1679b(a)(4) by representing that the Aspire Visa would help improve consumers' credit when, because of the high charges it imposed, it was likely to have the opposite effect, and by imposing immediate charges on consumers who took out the card, contrary to the representations that no deposits would be required and that $300 in credit would be available to consumers under the card. J.A. 47-51.

- Requiring payment in advance for credit repair services in violation of § 1679b(b). J.A. 51.
- Not providing the disclosures to consumers required by § 1679c. J.A. 52
- Not using written contracts complying with the requirements of § 1679d. J.A. 52
- Not providing the right to cancel required by § 1679e. J.A. 52.

The complaint also alleged that the issuing bank, Columbus (now Synovus), was responsible for CompuCredit's violations of CROA. J.A. 52-58.[2]

CompuCredit moved to compel arbitration of the CROA claims because the Aspire Visa credit card agreements contained arbitration clauses providing:

> Any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, "Claims"), upon the election of you or us, will be resolved by binding arbitration pursuant to this Arbitration Provision and the Code of Procedure ("NAF Rules") of the National Arbitration Forum ("NAF") in effect when the Claim is filed.

J.A. 62. The arbitration clause elaborated that:

> **Upon such an election, neither you nor we will have the right to litigate in court the claim being arbitrated, including in a jury trial, or to engage in pre-arbitration dis-**

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[2] Because the different roles of the two petitioners are not relevant to the question presented here, the remainder of this brief will refer to petitioners collectively as "CompuCredit."

> **covery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or member of any class of claimants relating to any claim subject to arbitration. Except as set forth below, the arbitrator's decision will be final and binding. Other rights available to you in court might not be available in arbitration.**

J.A. 63 (bold in original). Similarly, the "terms of offer" that consumers accepted by applying for an Aspire Visa Card stated:

> IMPORTANT—THE AGREEMENT YOU RECEIVE CONTAINS A BINDING ARBITRATION PROVISION. IF A DISPUTE IS RESOLVED BY BINDING ARBITRATION, YOU WILL NOT HAVE THE RIGHT TO GO TO COURT OR HAVE THE DISPUTE HEARD BY A JURY, TO ENGAGE IN PRE-ARBITRATION DISCOVERY EXCEPT AS PERMITTED UNDER THE CODE OF PROCEDURE OF THE NATIONAL ARBITRATION FORUM ("NAF") OR TO PARTICIPATE AS PART OF A CLASS OF CLAIMANTS RELATING TO SUCH DISPUTE. OTHER RIGHTS AVAILABLE TO YOU IN COURT MAY BE UNAVAILABLE IN ARBITRATION.

J.A. 61-62.[3]

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[3] NAF, the designated arbitration provider, was a notoriously anti-consumer arbitration organization. In 2009, after the Attorney General of Minnesota filed an action alleging numerous violations of consumer-protection laws by NAF, NAF entered into a consent decree barring it from handling consumer arbitra-

The district court denied the motion to compel arbitration, ruling that the arbitration clause was an unenforceable waiver of rights under CROA—specifically, the "right to sue" for violations of CROA recognized in § 1679c(a). Pet. App. 30a-45a. The court of appeals affirmed. Summing up its holding, the court stated:

> [T]he plain language of the CROA provides consumers with the "right to sue." 15 U.S.C. § 1679c. The "right to sue" means what it says. The statute does not provide a right to "some form of dispute resolution," but instead specifies the "right to sue." The act of suing in a court of law is distinctly different from arbitration. ... The right to sue protected by the CROA cannot be satisfied by replacing it with an opportunity to submit a dispute to arbitration.

Pet. App. 9a-10a.

SUMMARY OF ARGUMENT

Although the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, provides generally for the enforceability of agreements to arbitrate disputes affecting interstate commerce, this Court has long acknowledged that Congress may provide that federal statutory claims are not subject to arbitration by enacting legislation expressing the intention to "preclude a waiver

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tions. *See* http://pubcit.typepad.com/files/nafconsentdecree.pdf. CompuCredit's arbitration clause provides that if NAF is unavailable, CompuCredit "will substitute another nationally recognized arbitration organization utilizing a similar code of procedure." J.A. 62. The lower courts' disposition of the case made it unnecessary to consider the application of this provision to the CROA claims.

of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The plain language of CROA expresses exactly that intention.

CROA provides a statutory right of action allowing injured consumers to sue credit repair organizations for violations of the Act, and it specifically designates that entitlement a "right to sue" under the Act. 15 U.S.C. §§ 1679g, 1679c(a). CROA expressly forbids waiver not only of the "protection" it offers consumers, but also of "any right" a consumer has under CROA. *Id.* § 1679f(a). In addition to offering numerous protections to consumers, CROA mentions exactly two "rights" that it gives consumers: the right to cancel a contract with a credit repair organization within three days of signing it, and the right to sue for violations of CROA. 15 U.S.C. §§ 1679e, 1679c. The words of the law make it unmistakable that the right to sue is one of the rights of which CROA prohibits waiver.

A contract under which a consumer agrees to arbitrate legal claims that may arise in the future—that is, a predispute arbitration agreement—is a waiver of the right to sue. Arbitrating and suing are two different things, in both common meaning and practical terms, and a consumer who waives the ability to proceed in court over future controversies and retains only the right to arbitrate such claims has given up the right to sue. Indeed, this Court has long used the term "right to sue" to denote the ability to proceed in court rather than in arbitration or some other nonjudicial forum. *See, e.g., Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 368 (1984). In using that term to describe one of the non-waivable rights under CROA, Congress made manifest an intention to pre-

vent credit repair organizations from depriving consumers of their ability to proceed in court.

Attempting to evade this straightforward reading of the statute, CompuCredit invokes the FAA's policy favoring arbitration. This Court has stated, however, that the question whether a federal statute exempts claims from arbitration is decided on the basis of ordinary methods of statutory construction, not by applying a policy favoring arbitration. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 n.9 (2009). CompuCredit argues that because Congress did not single out arbitration for mention in CROA, as it has in some very recent statutes, the Court must presume that Congress did not intend CROA's non-waiver clause to apply to arbitration. But Congress's use in CROA of language that plainly forecloses waivers of the right to sue (together with all other rights and protections under CROA) must be given effect even if Congress could have written language more narrowly targeted to arbitration that would similarly have precluded enforcement of predispute arbitration agreements.

CompuCredit's contention that CROA's non-waiver provision is limited to "substantive" rights cannot be squared with the statute's broad proscription of waiver of "any right" and its explicit designation of the entitlement to bring an action in court as a "right." CROA's language explicitly brings the right to sue, "procedural" though it may be, within the scope of the non-waiver provision, unlike the terms of other statutes whose non-waiver provisions the Court has construed to apply only to substantive rights. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20

(1991); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

Similarly unavailing is CompuCredit's assertion that CROA does not in fact create a "right to sue" because the statute's reference to that right is in a provision requiring credit repair organizations to inform consumers of their rights, a provision that does not itself give rise to the rights it mentions. Leaving aside the oddity of CompuCredit's suggestion that CROA requires credit repair organizations to lie to consumers by telling them they have a right they do not in fact possess, CompuCredit's argument does not square with the statute. CompuCredit cannot dispute that CROA creates a right of action by providing that consumers may bring an action to have a court determine a credit repair organization's liability to them for violations of the Act, 15 U.S.C. § 1679g, nor that the statute describes this entitlement to bring an action as a "right to sue," *id.* § 1679c(a). Congress's use of the label "right" is highly significant because of CROA's prohibition on the waiver of "any right." *Id.* § 1679f(a). That the section that identifies the right to sue as a right is not the same section that creates it does not mean that the right does not exist or that it is not subject to the non-waiver provision.

CompuCredit's sole argument based on the actual words of the statute—that the non-waiver provision's statement that a purported waiver may not be enforced by a court or "any other person" must mean that Congress contemplated arbitration of CROA claims—is meritless. "Any other person" does not necessarily mean an arbitrator, and even if it did, there are many ways that an arbitrator might have occasion to consider whether a right under CROA had

been waived other than as a result of the enforcement of a mandatory predispute arbitration agreement. Thus, the Court need not distort the clear meaning of the non-waiver provision to give effect to the phrase "any other person."

CompuCredit briefly attempts to argue that, even if the non-waiver provision applies to the right to sue, a predispute arbitration agreement does not waive that right because either (1) the ability to arbitrate satisfies the right to sue, or (2) a consumer's ability to file a complaint in court, which will then be subject to compelled arbitration under the FAA, fulfills the right to sue. CompuCredit's first argument not only disregards the linguistic incompatibility between a "right to sue" and an ability to arbitrate, but also ignores the substantial differences between litigation and arbitration that this Court's recent decisions have described. *See, e.g*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749-52 (2011).

Even more remarkably, CompuCredit asserts that even if the right to sue means a right to sue in court, a mandatory predispute arbitration agreement does not take away that right, because a claimant can always file a complaint—although the FAA will require that the claims in it be referred to arbitration. CompuCredit's argument ignores not only that this Court has consistently described arbitration as a "waive[r]" of "the right to seek relief from a court," *Pyett*, 129 S. Ct. at 1469, but also that its own documents describing its arbitration requirement tell consumers that under the arbitration clause in their contracts, "YOU WILL NOT HAVE THE RIGHT TO GO TO COURT." J.A. 61-62.

Finally, CompuCredit's suggestion that enforcing CROA's non-waiver provision here will outlaw *post-dispute* settlement or arbitration agreements involving CROA claims (or even offers to enter into such agreements) is unfounded. Although the application of the provision to post-dispute arbitration agreements is a question not presented by this case, distinguishing such agreements from predispute agreements would be consistent with the Court's longstanding recognition that post-dispute agreements stand on a different footing from agreements that purport to waive statutory rights before a controversy has arisen. *See Callen v. Pa. R.R. Co.*, 332 U.S. 625, 631 (1948). Such a distinction would also be fully consistent with CROA's focus on the protection of consumers against predatory practices by credit repair organizations. That concern is far less pressing when a consumer who has asserted a statutory claim against a credit repair organization (and is represented by counsel to pursue that claim) agrees to settle or arbitrate it rather than go forward with a suit in court. Such agreements, unlike predispute arbitration agreements, presuppose the existence of the right to sue rather than negate it. The Court should not do violence to the language of CROA's non-waiver provision by reading it not to apply to the right to sue merely out of concern for the possible effect of its decision on post-dispute agreements to arbitrate.

ARGUMENT

I. The Statutory Language Unambiguously Prohibits Waiver of the "Right to Sue" Under CROA.

This Court has emphasized that whether a federal statute creates a non-waivable right to bring an action

in court, rendering a predispute arbitration agreement unenforceable, is a straightforward question of statutory construction. The issue in such a case is "whether Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628. "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. It is "fidelity to the [statute's] text," not a "preference for arbitration" or a "policy favoring arbitration," that determines whether a federal statute precludes enforcement of a predispute arbitration agreement for claims arising under it. *Pyett*, 129 S. Ct. at 1470 n.9.

In this case, the statutory text unambiguously "dictates the answer to the question presented." *Id.* Three interlocking provisions of CROA establish that the statute creates a right to seek judicial remedies—a "right to sue," in the statute's words—that is not subject to waiver through a predispute arbitration agreement.

First, the statute provides consumers with a private right of action. That is, it creates an entitlement to sue for violations by providing that a violator of the statute is liable for actual and punitive damages and attorneys' fees, to be assessed by a court in an action brought by either an individual or a class. 15 U.S.C. § 1679g.

Second, CROA requires that credit repair organizations inform consumers of their "rights" when entering into transactions with them. *Id.* § 1679c. It expressly refers to the entitlement to bring an action under § 1679g as one of those "rights" by requiring

credit repair organizations to inform each customer that "[y]ou have a right to sue a credit repair organization that violates the Credit Repair Organization Act." *Id.*

Third, the statute provides that the "rights" it creates may not be waived in consumer contracts: "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person." *Id.* § 1679f(a).

Thus, CROA creates an entitlement to sue, denominates that entitlement a "right," and forbids the waiver of "any right" under the statute. Together, those provisions unambiguously foreclose waiver of the right to sue.

It is axiomatic that the terms of a statute must be read together, not "as a series of unrelated and isolated provisions." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Moreover, as this Court has repeatedly stated, "the normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning." *Id.*; *accord, e.g.*, *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). These standard principles of statutory interpretation strongly underscore the straightforward reading of CROA as creating a non-waivable right to sue.

The Act's non-waiver provision uses the term "any right of the consumer under this subchapter" to describe what may not be waived, but does not itself define what constitutes a right of a consumer under CROA. 15 U.S.C. § 1679f(a). Section 1679c, however,

explicitly refers to, and lists, "rights" of a "consumer" under the statute, including the "right to sue" for a violation of CROA. Because the term "right" should mean the same thing when used in different parts of the statute, "any right of the consumer" under CROA for purposes of § 1679f(a) must, at a minimum, include a consumer "right" under CROA that is explicitly listed in § 1679c.[4] "The interrelationship and close proximity of these provisions of the statute 'presents a classic case for application of the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."'" *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (citations omitted). Indeed, because the "right to sue" language in § 1679c and the prohibition on waiver of "any right of the consumer" first appeared in the draft legislation that became CROA at the same time,[5] "[t]hat maxim is doubly appropriate here." *Powerex*, 551 U.S. at 232.

In turn, the "right to sue" recognized in § 1679c unquestionably refers to the express right of action created by § 1679g. Reading those two provisions together, as ordinary principles of statutory interpretation require, leaves no doubt that the liability created by § 1679g is what a consumer has a "right to sue" to obtain. At the same time, § 1679c's description of

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[4] Some of the rights listed in § 1679c are not rights "under this subchapter" (i.e., CROA) as specified by § 1679f(a), but under other provisions of federal law. But to the extent the entitlement to sue for a violation of CROA is a right, it is unquestionably a right *under CROA*.

[5] *Compare* H.R. 458, §§ 405 & 408, 100th Cong. (1987) (lacking this language), *with* H.R. 3596, §§ 405 & 408, 102d Cong. (1991) (adding language ultimately enacted).

§ 1679g as establishing a "right to sue" shows that Congress, in enacting CROA, conferred not only a right to the substantive liability created by § 1679g, but also a corresponding procedural right—that is, a right to "sue." And that right is necessarily protected by the non-waiver provision of § 1679f(a).

II. Compelling Arbitration Under a Predispute Arbitration Agreement Would Enforce a Waiver of the Right to Sue in Violation of CROA.

A. The Ordinary Meaning of "Right to Sue" Is a Right to Pursue a Claim in Court.

Because CROA does not define "right to sue" or "sue," the "ordinary" and "well-established" meaning of the words governs. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 86 (2000); *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011). The ordinary meaning of the word "sue" is to take someone to court. The word is not commonly used or understood to include commencing a contractual arbitration proceeding. Thus, a "right to sue" is a right to proceed with an action in court as opposed to an arbitration or other private mechanism for resolving a dispute. "Sue," and associated words such as "suit," "lawsuit," "legal proceedings," and "litigation" are not conventionally used to describe arbitration. Indeed, the American Arbitration Association (AAA) describes "arbitration" not as a *form* of litigation, but as an "alternative to litigation." AAA, *Arbitration*, http://www.adr.org/arb_med.

Dictionary definitions of "sue" confirm its well-established, common meaning. Black's Law Dictionary defines "sue" as "[t]o institute a lawsuit against (another party)." Black's Law Dictionary 1473 (8th

ed. 2004). Black's in turn defines "lawsuit" as "suit," *id.* at 905, which is defined as "[a]ny proceeding by a party or parties against another in a court of law." *Id.* at 1475.

Relevant definitions in Webster's of "sue" include "to follow or go to (a court) in order to obtain legal redress"; "to seek justice or right from (a person) by legal process : bring an action against : prosecute judicially"; "to proceed with (a legal action) and follow up to proper termination : gain by legal process"; and "to take legal proceedings in court : seek in law." Webster's Third New International Dictionary, Unabridged 2284 (1986). Similarly, the Oxford English Dictionary's relevant definitions of "sue" are "[t]o take (legal action); to institute (a legal process); to plead (a cause)"; "[t]o institute legal proceedings against (a person); to prosecute in a court of law; to bring a civil action against"; "[t]o make application before a court for the grant of (a writ or other legal process): often with implication of further proceedings being taken upon the writ, etc.; hence, to put in suit, to enforce (a legal process)"; "[t]o make legal claim; to institute legal proceedings; to bring a suit." 17 Oxford English Dictionary 120 (2d ed. 1989).

CompuCredit proffers a handful of competing dictionary definitions of "sue" that it claims are generic enough to include arbitrating as well as bringing a lawsuit in a court. Even those definitions, however, incorporate the concept of initiating a "legal process" or filing a "suit," which themselves denote actions in court as opposed to private dispute resolution mechanisms. *See* Pet. Br. 37-38. Indeed, CompuCredit does not point to any common usage in which the term "sue" actually refers to arbitrating; it merely points to

a few definitions that it thinks do not absolutely exclude arbitration.

B. This Court's Opinions Have Used the Terms "Sue" and "Right to Sue" to Refer to Proceedings in Court Rather than Arbitration.

This Court's own usage is consistent with the common meaning. Thus, the Court has said that the term "sue" refers to the use of "judicial process" or "civil process incident to the commencement or continuance of legal proceedings." *FHA v. Burr*, 309 U.S. 242, 245 (1940). As this Court has noted, "[a]rbitration is not a 'judicial proceeding,'" *McDonald v. City of West Branch*, 466 U.S. 284, 288 (1984); *accord, Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985), and those who choose arbitration agree to "forgo the legal process." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1774 (2010). And the Court has differentiated "litigation"—that is, the process of conducting a lawsuit[6]—from arbitration, treating the two as fundamentally different in important respects. *Concepcion*, 131 S. Ct. at 1749-52 (contrasting "litigation" and "arbitration"). Similarly, in *Stolt-Nielsen*, the Court used the term "litigation" to refer to proceedings in court, as distinct from "arbitration." 130 S. Ct. at 1776.

In keeping with the understanding that to "sue" means to proceed in court, this Court has repeatedly

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[6] Black's defines "litigation" as "[t]he process of carrying on a lawsuit ..., [a] lawsuit itself ...." Black's Law Dictionary 952 (8th ed. 2004). As explained above, Black's defines "sue" as pursuing a "lawsuit," so the words "sue" and "litigation" are closely linked: Litigation is what results when someone sues.

used the term "right to sue" to refer to a right to seek judicial remedies rather than being compelled to arbitrate or use some similar form of nonjudicial dispute resolution. The Court's use of the term in this way dates back at least to Justice Holmes's opinion in *Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet*, where the Court described the issue presented by the petitioner as whether "arbitration is a condition precedent to the right to sue." 252 U.S. 313, 315 (1920). In *Transcontinental & Western Air, Inc. v. Koppal*, the Court again used the term "right to sue" to refer to the ability to proceed in court rather than in arbitration, when it stated that the grievance and arbitration procedures of the Railway Labor Act did not "deprive an employee of his right to sue his employer for an unlawful discharge if the employee chooses to do so." 345 U.S. 653, 660 (1953). And in *Wilko v. Swan*, the Court expressly said that an arbitration agreement "waives [the plaintiff's] right to sue in courts." 346 U.S. 427, 435 (1953).

Later opinions also use the terms "sue" and "right to sue" in contradistinction to arbitration. In *U.S. Bulk Carriers, Inc. v. Arguelles*, the Court considered the case of a seaman who had refused to pursue a claim for lost wages through a contractual grievance procedure calling for arbitration and had, in the words of the Court, "sued in the federal court instead." 400 U.S. 351, 351 (1971). The Court held that under the statutes at issue, the seaman retained his ability to sue—that is, his "right to make the claim to the court." *Id.* at 354. Similarly, in *Iowa Beef Packers, Inc. v. Thompson*, the Court described the issue as whether "employees may sue in court to recover overtime allegedly withheld in violation of the Fair Labor

Standards Act, if their complaint of alleged statutory violation is also subject to resolution under grievance and arbitration provisions of a collective-bargaining agreement," although the Court ultimately found that question not presented and dismissed the writ as improvidently granted. 405 U.S. 228, 229 (1972).

Likewise, in *Alexander v. Gardner-Denver Co.*, addressing the question whether an arbitral decision foreclosed an action in court under Title VII, the Court characterized the lower courts as having held that the plaintiff was "bound by the prior arbitral decision and had no right to sue under Title VII." 415 U.S. 36, 45 (1974). The Court went on to hold that "[t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction" *Id.* at 47.

A decade later, in *Schneider Moving & Storage Co. v. Robbins*, Justice Powell, for a unanimous Court, again juxtaposed the "right to sue" with the obligation to arbitrate, framing the issue as "whether the parties to [certain] collective-bargaining agreements and ... trust agreements intended to require the arbitration of disputes between the trustees and the employer before the trustees could exercise their contractual right to sue in federal court." 466 U.S. at 368. The Court's opinion later substituted the phrase "right to seek judicial enforcement" for its earlier use of "right to sue," indicating that it equated the two. *Id.* at 371.

Indeed, contemporaneously with its expansion of the types of matters that are subject to arbitration, the Court has continued to use the terms "sue" and "right to sue" to refer to proceedings in court. Thus,

in *Karahalios v. National Federation of Federal Employees*, the Court held that the Civil Service Reform Act's creation of an administrative mechanism "precludes implication of a parallel right to sue in federal courts." 489 U.S. 527, 531 (1989). In *Allied-Bruce Terminix Cos. v. Dobson*, the Court observed that § 4 of the FAA "holds the defendants to their promise to submit to arbitration rather than making the other party sue them." 513 U.S. 265, 294 (1995). And in *Gilmer*, even while holding that the right to sue under the ADEA is subject to waiver, the Court used the term "right to sue" in a way that unmistakably referred to a right to bring a suit in court when it noted that "[i]n order for an aggrieved individual to bring suit under the ADEA, he or she must first file a charge with the EEOC and then wait at least 60 days. ... An individual's right to sue is extinguished, however, if the EEOC institutes an action against the employer." 500 U.S. at 27.[7]

Of course, the Court has overruled *Wilko*'s holding that the right to sue under the Securities Act of 1933 is non-waivable, *see Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989), and it has limited *Gardner-Denver* to its facts by holding that unions may waive their members' right to sue under federal civil rights statutes. *Pyett*, 129 S. Ct. at 1466-73. But the Court has not disapproved of *Wilko*'s

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[7] *Amicus curiae* DRI cites cases where the Court has used "right to sue" to refer to rights of action that other decisions have held are arbitrable. DRI Br. 16. Each example uses the term "sue" consistently with its normal meaning of bringing an action in court. Beyond that, they shed little light here because they neither address arbitration nor involve statutes with language foreclosing waiver of the entitlement to sue in court.

and *Gardner-Denver*'s English usage. In particular, nothing in the Court's recent opinions questions the aptness of the Court's use, in those and other opinions, of the phrase "right to sue" to denote a right to proceed in court as opposed to arbitration. Nor have the Court's more recent opinions contested the common-sense notion that a predispute arbitration agreement is a waiver of any otherwise available right to sue. On the contrary, the Court's opinions have repeatedly used analogous expressions such as "waiver of judicial remedies,"[8] "waive[r]" of "the right to seek relief from a court,"[9] "waiver of [a] statutory right to a judicial forum,"[10] "waiver" of "the right to select the judicial forum,"[11] and "waiver of a judicial forum,"[12] to describe predispute arbitration agreements.

Thus, in referring to a "right to sue," the Congress that enacted CROA used a phrase that repeated opinions of this Court had used to describe a right to proceed in court as opposed to arbitration or another nonjudicial dispute-resolution mechanism. This Court typically assumes that a statute's use of a term with an established judicial meaning reflects an intent to incorporate that meaning. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 (2011). That assumption is so powerful that statutes using terms of art may be

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[8] *Pyett*, 129 S. Ct. at 1465; *Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 483; *Mitsubishi*, 473 U.S. at 628.

[9] *Pyett*, 129 S. Ct. at 1469.

[10] *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998).

[11] *Rodriguez de Quijas*, 490 U.S. at 481.

[12] *McMahon*, 482 U.S. at 227.

given meanings that depart from the ordinary meaning of the same words. *See, e.g*, *Magwood v. Patterson*, 130 S. Ct. 2788, 2797 (2010). Where, as here, the settled judicial usage is in accord with the ordinary meaning of the words, the inference that Congress intended that meaning is even more powerful. *See, e.g.*, *Mac's Shell Serv. v. Shell Oil Prods. Co.*, 130 S. Ct. 1251, 1257 (2010) (adopting construction reflecting both "ordinary meaning" and judicially "established meanings").

C. The Statutory Context Confirms That the Right to Sue Refers to Pursuing an Action in Court.

Examining the statute as a whole confirms that the right to sue protected by CROA is a right to proceed in court. The scope of the statutory right to sue is fleshed out by the provision that creates the right of action under CROA, 15 U.S.C. § 1679g. The terms of § 1679g provide additional support for the conclusion that the statutory right to sue is not simply an entitlement to obtain a particular recovery, regardless of the forum, but a right to obtain that recovery in an action before a court.

Section 1679g repeatedly refers to a proceeding to determine the liability it creates as an "action." Thus, the statute provides that punitive damages may be allowed "in any action by an individual," *id.* § 1679g(a)(2)(A), and in "a class action," *id.* § 1679g(a)(2)(B). It further requires that the number of consumers affected by a violation be considered in awarding punitive damages in "any class action." *Id.* § 1679g(b)(4). And the statute provides for the award of costs and attorneys' fees in "any successful action." *Id.* § 1679g(a)(3). Section 1679i, which provides the

limitations period applicable to suits under CROA, similarly uses the term "action" to refer to such suits.

"Action" is a synonym for a lawsuit or other court proceeding: "[a] civil or criminal judicial proceeding." Black's Law Dictionary 31 (8th ed. 2004). As this Court has recognized, "the term 'action,' standing alone, ordinarily refers to a judicial proceeding." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 93 (2006). And a "right of action" is "'[t]he right to bring suit; a legal right to maintain an action,' with 'suit' meaning 'any proceeding ... in a court of justice.'" *Id.* at 91 (quoting Black's Law Dictionary 1488, 1603 (4th ed. 1951)).

CROA's references to the availability of a "class action" also signify that it contemplates proceedings in court, as class proceedings are generally unavailable in arbitration. *See Concepcion*, 131 S. Ct. at 1748-53; *Stolt-Nielsen*, 130 S. Ct. at 1775-76. Class arbitration was, if not unheard of, exceedingly rare when CROA was enacted, several years before *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which led to the creation of class arbitration rules by major arbitration providers. *See Stolt-Nielsen*, 130 S. Ct. at 1765, 1768 & n.4. This Court's recent decisions concerning class proceedings and arbitration have generally reserved the term "class actions" to describe class proceedings in court, and used "class arbitration," "classwide arbitration" or "class-action arbitration" to describe class proceedings in arbitration. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1748-53.

That § 1679g, by its terms, creates an entitlement to proceed in court is confirmed by its repeated use of the term "court" to describe the decisionmaker in actions brought to impose liability for CROA violations. The statute entitles individual plaintiffs to recover an

amount of punitive damages "as the court may allow." 15 U.S.C. § 1679g(a)(2)(A). In class actions, the amount of punitive damages that the class may receive is the sum of "the amount which the court may allow for each named plaintiff" and "the amount which the court may allow for each other class member." *Id.* §§ 1679(a)(2)(B)(i) & (ii). The statute commands that "the court shall consider" various factors in awarding punitive damages. *Id.* § 1679g(b).

In sum, § 1679g entitles plaintiffs to bring individual and class *actions* to recover amounts, including punitive damages, to be determined by a *court*. As this Court stated in *U.S. Bulk Carriers, Inc. v. Arguelles*, such statutory language "implies a right to make the claim to the court and not a duty to make it before a grievance committee or before an arbiter." 400 U.S. at 354. Even if the ability to arbitrate could conceivably be brought within the meaning of a right to sue in the abstract, CompuCredit does not argue—nor could it—that a right to pursue an "action" in a "court" is satisfied by the ability to demand resolution of a claim by an arbitrator. Of course, most statutory causes of action contemplate judicial proceedings, but CROA is distinctive in not only providing for an action to be brought in court, but also denominating the entitlement to proceed in court a right and making all rights non-waivable. The language of § 1679g, when read together with § 1679c and § 1679f(a), thus strongly reinforces that the "right to sue" recognized in § 1679c is a right to proceed in court, and that enforcement of a predispute arbitration clause would effect a waiver of that right.

III. CompuCredit's Attempts to Avoid the Statute's Clear Language Are Unavailing.

A. That CROA Does Not Expressly Refer to Arbitration Does Not Negate Its Clear Language.

Against the straightforward reading of the statute set forth above CompuCredit raises a number of objections. To begin with, CompuCredit asserts that construing the statute to create a non-waivable right to sue runs counter to the pro-arbitration policy incorporated in the FAA and given effect in decisions of this Court. But this Court has never asserted that the policy underlying the FAA can overcome a subsequent congressional choice to create a non-waivable right to a judicial forum. "Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command." *McMahon*, 482 U.S. at 226. The Court has repeatedly stated that if a statute's text evinces an intent to create such a non-waivable right, it will be given effect notwithstanding the FAA. *See, e.g.*, *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 227; *Mitsubishi*, 473 U.S. at 628. As the Court emphasized in *Pyett*, determining whether a law incorporates such an intent is a conventional matter of statutory construction, not an exercise in implementing a "preference for arbitration." 129 S. Ct. at 1470 n.9.

Nonetheless, CompuCredit argues that CROA's language making the right to sue non-waivable does not foreclose enforcement of a predispute arbitration agreement because Congress did not, as it could have, say in so many words that predispute arbitration agreements are unenforceable as to CROA claims. CompuCredit cites a number of recently enacted stat-

utes that expressly refer to arbitration and explicitly prohibit enforcement of agreements to arbitrate statutory claims. *See* Pet. Br. 19-21. The absence of such language, CompuCredit argues, precludes construing CROA to make predispute arbitration agreements unenforceable.

CompuCredit's argument rests on the fallacy that because one combination of words may achieve a particular legislative aim, any other words must mean something different, even when used in an entirely different statute. But "[b]y nature, language is simultaneously robust and precise. Different verbal formulations can, and sometimes do, mean the same thing." *Cohen v. United States*, __ F.3d __, 2011 WL 2600672, at *12 (D.C. Cir. July 1, 2011).

Moreover, CompuCredit's examples do not support its suggestion that there is some standard formulation Congress has used when it wishes to prevent enforcement of a predispute arbitration agreement. Of the nine examples CompuCredit provides of statutory provisions that either prevent enforcement of predispute arbitration agreements or authorize agencies to do so (*see* Pet. Br. 19-21), six are from a single piece of legislation, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010).[13] Of the remaining three,

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[13] The Dodd-Frank provisions are: 7 U.S.C. § 26(n)(2) (applicable to commodities-fraud whistleblower suits); 12 U.S.C. § 5567(d)(2) (applicable to suits by whistleblowers who report wrongdoing to the Consumer Financial Protection Bureau (CFPB)); 15 U.S.C. § 1639c(e)(1) (applicable to home mortgages); 18 U.S.C. § 1514A(e)(2) (applicable to securities-fraud whistleblower suits); 12 U.S.C. § 5518(b) (authorizing CFPB to prohibit arbitration clauses in consumer contracts); and 15 U.S.C. § 78o

(*Footnote continued*)

one dates from 2009 and prohibits arbitration of whistleblower-protection claims involving reports of misuse of economic-stimulus funds. *See* Pub. L. No. 111-5, § 1553(d), 123 Stat. 115, 301 (2009). Another was passed in 2006 to prohibit arbitration clauses in consumer-credit contracts involving active members of the armed forces and their dependents. 10 U.S.C. § 987(e)(3). The third, dating from 2002, prevents enforcement of predispute arbitration agreements in automobile dealers' franchise agreements. 15 U.S.C. § 1226(a)(2). In short, CompuCredit's examples show nothing more than how very recent Congresses have legislated with respect to arbitration in a small number of acts.

Two other examples cited by CompuCredit, 22 U.S.C. §§ 290k-11(a) & 1650a(a), have nothing to do with the words that Congress uses when it desires to "deny enforcement of arbitration agreements." Pet. Br. 19. Those two statutes provide that arbitration agreements involving investment disputes under certain international conventions *are* enforceable, and specify that the FAA does not govern arbitrations under those conventions. The language necessary to *provide for* international arbitration not subject to the FAA has no bearing on what language is necessary or sufficient to *preclude* enforcement of a predispute arbitration agreement applicable to claims under a federal statute.

That Congress has, in a handful of recent enactments, specifically exempted (or authorized an agency to exempt) certain claims from predispute arbitration

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(authorizing SEC to prohibit arbitration clauses in brokerage contracts).

agreements hardly demonstrates that the earlier Congress that enacted CROA did not achieve the same result by creating a non-waivable right to sue. In using the term "right to sue" and foreclosing "waiver" of that right, Congress chose exactly the words that this Court had, at the time Congress acted, repeatedly used to describe the type of non-waivable right to invoke judicial remedies that, if conferred by Congress, would preclude enforcement of an arbitration agreement. *See supra* 19-24. It is perfectly understandable why the Congress that enacted CROA would not have specifically mentioned arbitration and instead used a provision barring waiver of *any* right (including the right to sue): In CROA, Congress was not providing *only* that arbitration agreements are unenforceable, or *only* that waivers of the right to bring actions in court under § 1679g are void; it was providing that *any* waiver of *any* right or protection under the statute was unenforceable, and thus used the expansive language appropriate to that end. Having separately created an entitlement to sue and defined it as a right, Congress had no need to do any more to provide that waivers of that right, in common with waivers of all other rights under CROA, are void.

By contrast, in the 2002 legislation CompuCredit cites involving arbitration of automobile dealership franchise disputes, Congress was acting solely with respect to arbitration, and did not create any other rights that could have been the subject of a general non-waiver provision. *See* 15 U.S.C. § 1226(a)(2). Similarly, another recent law cited by *amicus curiae* DRI, the Department of Defense Appropriations Act, 2010, Pub. L. 111-118, § 8116(a)(1), 123 Stat. 3409, 3454 (2009), is aimed solely at preventing compelled arbitration of sexual assault and harassment claims

against large defense contractors. The provision, prompted by a single widely publicized case, creates no other rights that could be subject to a general non-waiver provision.

Several of the recent statutes CompuCredit cites, like CROA, actually reflect the concept that arbitration is a waiver of the right to sue, in that they foreclose enforcement of predispute arbitration agreements in provisions generally prohibiting waiver of rights under the statute. Thus, four of the statutes state, immediately before the language CompuCredit quotes, that "[t]he rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment *including by a predispute arbitration agreement*." 7 U.S.C. § 26(n)(1) (emphasis added); *see also* 12 U.S.C. § 5567(d)(1); 18 U.S.C. § 1514A(e)(1); Pub. L. No. 111-5, § 1553(d)(1) (all containing substantially identical language). In addition, 15 U.S.C. § 1639c(e), which prohibits predispute arbitration agreements in mortgages, permits *post*-dispute agreements to arbitrate claims arising out of home mortgages only to the extent that they do not operate as a "waiver of [a] statutory cause of action," and it thus prohibits post-dispute arbitration agreements that "bar a consumer from bringing an action in an appropriate ... court" on a federal statutory claim. *See id.* § 1639c(e)(3). All of these provisions are fully consistent with congressional understanding that, when a statute confers a right to a federal judicial remedy, a provision precluding waiver of that right bars enforcement of a predispute arbitration agreement. That the provisions in these recent statutes also specifically mention arbitration is no doubt attributable to heightened congressional attention to the increased use of arbitration agreements in

consumer contracts resulting from this Court's recent opinions emphasizing the otherwise expansive scope of the FAA.

B. CROA's Non-Waiver Provision Is Not Limited to "Substantive" Rights.

CompuCredit rests much of its argument on the notion that CROA's non-waiver provision protects only "substantive" rights under the statute, not the procedural right to bring an action in court. CompuCredit invokes decisions of this Court holding that statutory provisions or public policies prohibiting waiver of rights under other statutes apply only to "substantive" rights and do not foreclose enforcement of predispute arbitration agreements. *See, e.g.*, *Gilmer*, 500 U.S. at 26-28 & n.3; *see also Pyett*, 129 S. Ct. at 1464 n.5; *Rodriguez de Quijas*, 490 U.S. at 480-82; *McMahon*, 482 U.S. at 227-28. But none of these cases involved a statute that both forbade waiver of "any right" and expressly denominated the right to sue as a right under the statute.

Thus, in *Gilmer*, the Court considered the Age Discrimination in Employment Act (ADEA), which requires a waiver of rights to be knowing and voluntary and prohibits advance waivers of rights. The ADEA, however, nowhere expressly provides that the entitlement to bring an action in court is a "right" within the meaning of the waiver provision, *see* 29 U.S.C. § 626, and thus the Court's holding that the ability to sue could be waived through a predispute

arbitration agreement did not conflict with the statute's express terms.[14]

Similarly, in *McMahon* and *Rodriguez de Quijas*, the Court considered whether language in the Securities Exchange Act of 1934 and the Securities Act of 1933 voiding any agreement to "waive compliance with any provision of [the Act]," 15 U.S.C. § 78cc(a); *id.* § 77n, prohibited enforcement of a predispute arbitration agreement. Although the Court had, in *Wilko*, interpreted this language to preclude waiver of the "right to sue" under the Securities Act, 346 U.S. at 435, the Court's opinions in *McMahon* and *Rodriguez de Quijas* pointed out that the statutory language actually prohibits waiver only of provisions of the statutes with which someone would otherwise have a duty to "comply"—that is, the substantive requirements and prohibitions the laws impose on participants in the securities industry.

As the Court put it in *McMahon*:

> What the antiwaiver provision of § 29(a) [of the Exchange Act] forbids is enforcement of agree-

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[14] The ADEA's waiver provision was added by the Older Workers Benefit Protection Act (OWBPA) while *Gilmer* was pending in this Court. The provision was inapplicable to *Gilmer* itself because the OWBPA provided that it did "not apply with respect to waivers that occur before the date of enactment of this Act." Pub. L. No. 101-433, § 301(a), 104 Stat. 978, 983 (1990). *Gilmer* cited the waiver provision only in a footnote and stated in passing that it did not prohibit arbitration. *See* 500 U.S. at 28 n.3, 29. The Court's later opinion in *Pyett*, however, takes as a given that the provision limits only waiver of substantive rights. *See* 129 S. Ct. at 1464 n.5 ("The right to a judicial forum is not the nonwaivable 'substantive' right protected by the ADEA."). A number of lower courts have also so held. *See* Pet. Br. 33 & n.7.

> ments to waive "compliance" with the provisions of the statute. But § 27 itself [the provision granting district courts jurisdiction over actions under the Exchange Act] does not impose any duty with which persons trading in securities must "comply." By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because § 27 does not impose any statutory duties, its waiver does not constitute a waiver of "compliance with any provision" of the Exchange Act under § 29(a).

482 U.S. at 228; *accord Rodriguez de Quijas*, 490 U.S. at 480-83. Because a predispute agreement to arbitrate does not waive "compliance" with the substantive obligations imposed by the securities laws, *see* 482 U.S. at 229-30, the Court in *McMahon* held that the antiwaiver provision of the Securities Act did not bar enforcement of such an arbitration agreement, *id.* at 238, and the Court in *Rodriguez de Quijas* followed suit with respect to the Exchange Act, overruling *Wilko*. 490 U.S. at 484-85.

CROA's terms, by contrast, provide the clear indication of congressional intent to foreclose waiver of the right to sue that this Court found lacking in *Gilmer*, *McMahon*, and *Rodriguez de Quijas*. Unlike the statute at issue in *Gilmer*, CROA's provision prohibiting waiver of "any right" of a consumer is backed up by a provision that explicitly states that the "right to sue" is among the rights conferred on consumers. And unlike the securities laws at issue in *McMahon* and *Rodriguez de Quijas*, CROA's non-waiver provision does not contain language indicating that it is limited to substantive protections with which credit repair organizations must "comply."

CompuCredit apparently abandons the argument from its petition for certiorari that CROA, like the securities laws, should be read to bar only waiver of compliance with CROA's substantive protections because the non-waiver provision is entitled "Noncompliance with this subchapter." 15 U.S.C. § 1679f; *see* Pet. for Cert. 21-22. That argument is, in any event, meritless. Statutory titles may be used only to "shed light on some ambiguous word or phrase in the statute itself." *Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 483 (2001) (brackets and citations omitted). Here, there is a perfectly straightforward explanation for the title's reference to "noncompliance": Subsection (b) of § 1679f makes attempting to obtain an invalid waiver a form of noncompliance with CROA, and subsection (c) makes any contract that does not comply with CROA's provisions void. More importantly, because there is no ambiguity over whether the non-waiver provision applies only to substantive compliance with CROA, the title is irrelevant as an interpretive tool.

Indeed, the text of CROA's non-waiver provision forecloses the claim that it is limited to substantive rights in two ways. First, the statute explicitly forbids waiver of "any" right. 15 U.S.C. § 1679f(a). As this Court has observed, the use of the word "any" to modify a noun "suggests a broad meaning." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Reading a statutory reference to "any right of a consumer under [this Act]" to exclude a right designated as such earlier in the same statute

would hardly comport with the normal meaning of "any."

Second, the statute forbids not only waiver of "any right of a consumer," but also waiver of "any protection provided by" the Act. 15 U.S.C. § 1679f(a). The prohibition of waiver of any "protection" afforded by CROA, much like the securities laws' prohibition of waivers of "compliance," is most naturally read as referring to the substantive requirements of CROA—for example, its provisions prohibiting credit repair organizations from making untrue or misleading statements, advising consumers to change their identity to obscure unfavorable credit information, committing any fraud or deception, or requiring payment in advance from consumers, *see* § 1679b, requiring that consumers be provided with disclosures, § 1679c, and mandating the use of written contracts with specified terms, § 1679d.

Because the prohibition on the waiver of any "protection" of CROA naturally encompasses the substantive provisions of the statute (and does so more naturally than does the term "right"), interpreting "any right" to encompass only the substantive provisions of CROA would violate the well-established "canon that statutes should be read to avoid making any provision 'superfluous, void, or insignificant.'" *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1268 (2011) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). The natural reading of the term "right" would encompass those features of CROA that the statute expressly identifies as consumer "rights," of which there are exactly two: the "right to sue," § 1679c, and the "right to cancel" a contract with a credit repair organization,

§§ 1679c, § 1679d(b)(4), 1679e.[15] It would be extremely odd to interpret a statutory reference to "any right" under a statute to exclude one of only two rights mentioned in the statute.

CompuCredit's suggestion that the structure of the Act indicates that the non-waiver provision does not apply to the right to sue because the statutory right of action follows the non-waiver provision in the statute, whereas other rights and protections granted by the statute precede the non-waiver provision, is meritless for three reasons. First, the non-waiver provision refers to any protection or right "under this subchapter," § 1679f(a), and the CROA provisions following the non-waiver section, like the provisions preceding it, are part of "this subchapter." Second, the right to sue, while drawing its substance from the right-of-action provision following the non-waiver provision, is specifically declared to be a "right" under CROA in a section *preceding* the non-waiver provision, so even if § 1679f were read to refer only to rights previously mentioned in CROA, the right to sue would qualify. Third, the order of the non-waiver provision and the provision creating the statutory right of action most likely reflects not an intention to render the non-waiver provision inapplicable to the right to sue, but the common legislative practice of grouping remedial provisions near the end of a statute. Thus, § 1679g, providing for the private right of action, is immediately followed by § 1679h, concerning

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[15] As CompuCredit agrees, *see* Pet. Br. 4, the remaining rights that must be disclosed by a credit repair organization under § 1679c are not rights under CROA, but rights under other laws regulating credit bureaus.

government enforcement actions, and § 1679i, providing the limitations period applicable to both private and governmental actions.

CompuCredit protests, however, that not limiting the non-waiver provision to substantive rights would be inconsistent with all this Court's decisions allowing arbitration of federal statutory actions, because each statutory action that this Court has held arbitrable could also properly be characterized as a "right to sue." Pet. Br. 25 & n.5 (citing the Sherman Act, the Securities Act, the Truth in Lending Act, RICO, and the ADEA). In none of those instances, however, does the statute both prohibit waiver of rights and expressly characterize the entitlement to bring an action as a "right to sue," or even as a "right" at all.

CompuCredit cites a handful of statutes under which this Court has *not* considered the arbitrability of claims and asserts that they, too, contain both statutory causes of action and non-waiver provisions that might similarly prohibit waiver of the right to sue if CROA is construed to prevent waiver of that right. These few examples hardly support CompuCredit's argument that "[m]any statutes providing for a cause of action also include an anti-waiver provision resembling the one in the CROA." Pet. Br. 25-26.

Moreover, the statutes CompuCredit lists are all readily distinguishable from CROA. As already discussed, the first statute CompuCredit cites, the ADEA, differs from CROA in that it does not specify that the entitlement to sue is a protected "right." The rest of the statutes CompuCredit cites cover narrow subjects that have generated little litigation. One protects employees against misuse of polygraphs (29 U.S.C. § 2005(d)); the other three provide whistle-

blower protection to, respectively, food workers (21 U.S.C. § 399d(c)(2)), railroad workers (49 U.S.C. § 20109(h)), and motor carrier workers (*id.* § 31105(g)). The polygraph statute, unlike CROA, does not refer to a "right to sue," and its reference to the non-waivability of "procedures," in context, has been held by one court to refer to the procedures established by the statute for the use of polygraphs, not to the ability to sue. *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877, 880-82 (9th Cir. 1992); *but see Harmon v. CB Squared Servs.*, 624 F. Supp. 2d 459, 467 & n.5 (E.D. Va. 2009). The three whistleblower statutes similarly do not mention a "right to sue," and their prohibition on the waiver of "remedies" may refer simply to the entitlements they create to damages and other relief rather than to the availability of a judicial forum for obtaining those remedies.[16]

The point here is not that these four statutes necessarily allow enforcement of predispute arbitration agreements. Rather, the point is that whether they do so depends on their own unique texts, which differ materially from CROA's. The possibility that the distinct language of a small number of statutes, which apparently have generated relatively little litigation, might be construed to foreclose a waiver of judicial remedies does not suggest that interpreting CROA to prohibit waiver of the right to sue would somehow open the floodgates for non-waiver provisions to bar

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[16] Indeed, 49 U.S.C. § 20109 has a subsection headed "remedies," which is limited to setting forth the types of relief the statute authorizes. A natural reading of that section's non-waiver provision may be that "remedies" refers specifically to those forms of relief.

predispute arbitration agreements under a large number of federal statutes. Congress may or may not have precluded predispute waivers of judicial remedies under the other statutes CompuCredit cites—and if it did, its instructions should be honored. But whether Congress prohibited waiver of the right to sue in those statutes is an entirely different question from whether it did so in CROA.

C. CompuCredit's Argument That CROA Does Not Create a Right to Sue Cannot Be Squared with the Statute's Terms.

Echoing the dissenting judge below, CompuCredit asserts that CROA does not create a "right to sue" at all, even though its disclosure provision makes credit repair organizations tell consumers they have one. To be sure, the disclosure provision is just that—a requirement that credit repair organizations provide information to consumers—and it does not, *by itself*, create the private right of action to enforce CROA. But that does not mean that the disclosure provision is a requirement that credit repair organizations lie to consumers by telling them they have a right they do not actually possess, for CROA does, quite expressly, create a private right of action.

Specifically, § 1679g provides that a credit repair organization that violates CROA shall be "liable" to a consumer for actual and punitive damages and attorneys' fees, and its terms expressly contemplate the bringing of "actions" in which "the court" shall determine the amount of damages. As this Court has recognized, "to say that A shall be liable to B is the *express* creation of a right of action." *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 n.11 (1994) (quoting *id.* at 822 (Scalia, J., dissenting in part)). The sig-

nificance of the "right to sue" language in § 1679c is not that it *creates* the entitlement to bring a private action to enforce the statute, but that it *designates* that entitlement as one of the "rights" protected by CROA and makes clear that the right is one "to sue," not just to obtain a recovery through some other means.[17] Together, the provisions contain what this Court has elsewhere described as "explicit rights-creating terms," evincing that "Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 285 (2002). That intent to confer a "right" is critically important because CROA makes waivers of the rights it confers void and unenforceable.

D. The Non-Waiver Provision's Use of the Term "Any Other Person" Does Not Reflect Congressional Intent to Allow Predispute Agreements to Arbitrate CROA Claims.

To bolster its argument that the statute's non-waiver provision does not foreclose enforcement of predispute arbitration agreements, CompuCredit points out that CROA provides that waivers of rights

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[17] The Court need not consider whether the "right to sue" disclosure requirement would, by itself, create both a cause of action and a non-waivable right. However, it seems more than farfetched that Congress would direct credit repair organizations to tell consumers they have a right that Congress did not intend to confer—that is, that a statute aimed at *preventing* misrepresentations to consumers would itself require providing them with false and misleading information. Congress's reference to a "right to sue," by itself, would likely suffice to demonstrate the necessary congressional intent to create a right of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

or protections under the statute "may not be enforced by any Federal or State court *or any other person*." 15 U.S.C. § 1679f(a)(2). CompuCredit contends that "any other person" must refer to an arbitrator, and that the statute must contemplate that consumers can be required to arbitrate CROA claims under a predispute agreement, because otherwise an arbitrator would not be in a position to consider whether to "enforce" a waiver of some right under CROA.

CompuCredit's suggestion that the words "any other person" would be meaningless unless predispute agreements to arbitrate CROA claims were enforceable is wrong for two reasons. First, CompuCredit's assumption that "any other person" necessarily refers to an arbitrator is unfounded. The term could easily encompass an administrative agency officer, or even a private person or company attempting to enforce a waiver through litigation. The most natural reading of the language is that it expresses Congress's determination that waivers of statutory rights should not be enforceable by *anyone*. There is no basis in the text or legislative history for CompuCredit's assumption that Congress specifically intended the language to refer to arbitrators, let alone intended to signal that it approved, or even contemplated, compelling consumers to arbitrate CROA claims under predispute arbitration agreements.

Second, even if "any other person" were read to refer exclusively to an arbitrator, the possibility that an arbitrator might be in a position to decide whether to enforce a waiver of rights under CROA could arise in any number of circumstances other than compelled arbitration of a consumer's CROA claims. Nothing in CROA prohibits consumers and credit repair organi-

zations from entering into predispute agreements to arbitrate claims other than claims under CROA itself: The "right to sue" that the statute protects against waiver is only a right to sue *for violations of CROA*. *See* 15 U.S.C. §§ 1679c(a), 1679f(a). Thus, a credit repair organization could demand arbitration against a consumer to collect a payment for services allegedly due under its contract. If the consumer defended on the ground that she had exercised her right to cancel the contract under § 1679e or that the credit repair organization's contract did not comply with the requirements of § 1679d or improperly required payment in advance for services, § 1679f(a)(2)'s reference to "any other person" would operate to prevent the arbitrator from finding that the consumer had waived those statutory rights and protections.[18]

Similarly, if a consumer were required to arbitrate *non-CROA* claims against a credit repair organization under a predispute arbitration agreement and initiated an arbitration to pursue such claims, § 1679f(a)(2) would preclude the arbitrator from construing the arbitration clause also to encompass claims under CROA. Moreover, to the extent that a *post*-dispute agreement to arbitrate CROA claims is enforceable (an issue not presented here), the "any other person" language would also preclude an arbitrator in a CROA case submitted under such an agreement from finding

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[18] The likelihood of arbitration by a credit repair organization to collect a debt owed by a consumer is underscored by a statistic cited in *amicus curiae* DRI's brief in support of the petition for certiorari: Of 33,948 consumer arbitrations conducted by the NAF between 2003 and 2007, all but 15 were debt-collection proceedings. DRI Cert.-Stage Br. 5.

that the claimant had waived any right or protection under CROA.

In sum, giving meaning to the words "any other person" does not require negating the effect of the non-waiver provision by permitting compelled arbitration of CROA claims pursuant to a predispute arbitration agreement.

IV. CompuCredit's Arguments that Compelled Arbitration Under a Predispute Agreement Is Not a Waiver of the Right to Sue Defy Reality.

CompuCredit argues that, even if the statutory right to sue is among the rights protected by CROA's anti-waiver provision, a predispute arbitration agreement does not in fact waive the right to sue, notwithstanding that its enforcement would concededly prevent customers from maintaining an action in court for a violation of the Act. CompuCredit's argument is twofold: First, CompuCredit argues that to arbitrate itself falls within the scope of the statutory term "to sue," and thus if respondents can arbitrate they have not waived their right to sue. Second, CompuCredit asserts that even if the right to sue refers to the entitlement to proceed in *court*, enforcement of the arbitration clause would not have prevented respondents from suing because they still could *file* a complaint in court, although they would immediately be compelled to arbitrate their claims instead.

Both these alternative arguments are incorrect. Neither arbitration itself nor the bare ability to file a complaint in court on claims that must be referred to arbitration fulfills the right to sue under the statute.

A. Suing and Arbitrating Are Two Different Things.

To reject CompuCredit's contention that the ability to arbitrate satisfies the right to sue, the Court need look no further than the words of the statute. For the reasons already explained (*see supra* 17-26), the common meaning of the term "right to sue" is incompatible with compulsory arbitration under a predispute agreement. And the difference between the right to sue created by Congress and the ability to arbitrate that CompuCredit seeks to substitute in its place is not merely a matter of words. Behind the difference in nomenclature between suing and arbitrating lie real differences in substance that underscore that being compelled to arbitrate under a predispute agreement does not fulfill a statutory right to sue.

This Court's recent decisions in *Concepcion* and *Stolt-Nielsen* highlight the differences between litigation and arbitration. As the Court put it in *Stolt-Nielsen*, parties to an arbitration "forgo the procedural rigor and appellate review of the courts," 130 S. Ct. at 1775, and receive instead "the simplicity, informality, and expedition of arbitration." *Id.* at 1774 (quoting *Mitsubishi*, 473 U.S. at 678). The significant differences between arbitration and litigation include:

- In arbitration, "the scope of judicial review is much more limited" than in litigation, *Stolt-Nielsen*, 130 S. Ct. at 1777, and legal errors by arbitrators are not grounds for setting aside their awards, *see Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). Thus, in arbitration, it is "more likely that errors will go uncorrected." *Concepcion*, 131 S. Ct. at 1752.

- Arbitration proceedings often do not permit the full scope of discovery offered by the Federal Rules of Civil Procedure. *See Concepcion*, 131 S. Ct. at 1747.
- Arbitrators generally do not follow rules of evidence applicable in court proceedings. *See id.*
- There is no right to a jury trial in an arbitration proceeding. *See id.*
- This Court has held that "classwide arbitration interferes with fundamental attributes of arbitration," *Concepcion*, 131 S. Ct. at 1748, because a class proceeding "*requires* procedural formality" while the defining feature of arbitration is "informality," *id.* at 1751, because a class proceeding "increases risks to defendants," *id.* at 1752, and because "arbitration is poorly suited to the higher stakes of class litigation." *Id.* Accordingly, the Court has held that a party may not be compelled to participate in class arbitration unless it has agreed to do so, *Stolt-Nielsen*, 130 S. Ct. at 1776, and that when an arbitration agreement forecloses class proceedings, states may not enforce otherwise applicable principles of contract law under which waivers of class proceedings for certain types of claims are deemed unconscionable. *Concepcion*, 131 S. Ct. at 1748.

These differences do not mean that arbitration is by nature inadequate to vindicate all statutory claims. This Court has repeatedly said otherwise and has held that the FAA reflects a congressional judgment that predispute agreements to submit claims arising between the parties to arbitration provide adequate means to resolve statutory claims—unless Congress has provided otherwise in the particular statute at is-

sue. *See, e.g.*, *Pyett*, 129 S. Ct. at 1465, 1469-71; *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 483. The Court has also held that predispute arbitration agreements are generally enforceable because they do not entail waivers of *substantive* rights. *See, e.g.*, *Pyett*, 129 S. Ct. at 1470; *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 229-30; *Mitsubishi*, 473 U.S. at 628.

At the same time, the Court has recognized that "all statutory claims may not be appropriate for arbitration," *Gilmer*, 500 U.S. at 26, and that the determination whether a statutory claim requires the procedural formalities of litigation is for Congress to make. *See id.* Thus, although predispute arbitration agreements do not violate prohibitions on waiver of *substantive* rights, the matter is entirely different if Congress creates non-waivable *procedural* rights. The FAA does not provide for enforcement of a predispute arbitration agreement when a statute provides for a non-waivable right to pursue a claim in a "judicial forum." *Id.* That is exactly what CROA does by creating a non-waivable right to sue.

The substantial differences between arbitration and lawsuits provide ample reason for Congress to make such a choice. That choice is particularly understandable in a statute that, like CROA, explicitly provides for class-action recoveries, which will generally be unavailable in arbitration. Of course, the fact that a statutory scheme contemplates class actions may not be enough to render claims under the statute nonarbitrable absent a further textual indication that Congress intended to preclude waiver of judicial remedies. *See Gilmer*, 500 U.S. at 32. Nonetheless, the general unavailability of class actions in arbitration

provides a reason for Congress to prefer litigation for statutory claims for which it desires to ensure the availability of class remedies.

Here, the creation of a non-waivable right to sue reflects a congressional determination that, to fulfill CROA's consumer-protection purposes, it is appropriate to provide consumers with a non-waivable right to avail themselves of the formalities and other features of litigation rather than permitting prospective defendants to obtain the advantages they perceive from arbitration by securing advance waivers of consumers' ability to litigate. Thus, in CROA, Congress itself resolved the cost-benefit tradeoff between litigation and arbitration instead of allowing credit-repair organizations to decide the question through their form contracts. To argue that arbitration satisfies the non-waivable right to sue that Congress created is to ignore not only the words Congress chose to express its purposes, but also the substantial differences between suing and arbitrating.

B. Compulsory Arbitration Is a Waiver of the Right to Proceed in Court.

CompuCredit's fallback claim that enforcing an arbitration agreement does not give effect to a waiver of the right to sue because it does not prevent a plaintiff from filing a complaint in court—just from litigating it once it is filed—blinks reality. If the arbitration agreement here is enforceable with respect to CROA claims, a court may not adjudicate a complaint containing such claims. Rather, under the terms of the FAA, the court must, on CompuCredit's request, grant a motion to compel arbitration and, meanwhile, stay or dismiss the claims. *See* 9 U.S.C. §§ 3, 4; *Dean Witter*, 470 U.S. at 218. A party's bare ability to file a

complaint that a court *cannot* act upon is *not* a right to sue.

Moreover, although CompuCredit could not physically prevent respondents from filing a complaint asserting CROA claims, respondents would not have a *right* to take that step if CompuCredit's arbitration clause were enforceable. The clause itself expressly provides that customers have *no* such right: It says that if one party elects arbitration, "neither you nor we will have the right to litigate in court the claim being arbitrated." J.A. 63. Or, as CompuCredit's "Terms of Offer" succinctly put it: "YOU WILL NOT HAVE THE RIGHT TO GO TO COURT." J.A. 61-62. CompuCredit's assertion that the arbitration clause offers consumers a meaningful "right" to file a complaint in court flies in the face of its own description of the effect of the clause.

Indeed, where an enforceable agreement specifies that claims are subject to mandatory arbitration, a party who instead sues in court or otherwise refuses to arbitrate is in breach of the agreement. *See* 9 U.S.C. § 4; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967) (FAA requires court "to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored"); *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010); *see also Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 36 (2d Cir. 1987) (right to compel arbitration arises when "a party 'breache[s] the arbitration agreement by refusing to arbitrate'") (citation omitted). That a party may be *able* to file a complaint in breach of a contractual obligation to arbitrate (subject to being compelled to arbitrate) does not mean that she has the *right* to

do so. As this Court has recognized, a person has no "right" to violate a valid contractual obligation. *See Rousey v. Jacoway*, 544 U.S. 320, 328 (2005).

An obligation to arbitrate is thus incompatible with a right to proceed in court. This Court has therefore repeatedly characterized arbitration agreements as "waivers" of the right to seek judicial remedies. *See supra* 23. The Court's consistent characterizations of arbitration agreements as waivers foreclose any argument that the mere ability to file a complaint—subject to mandatory arbitration of the claims it contains—means that an arbitration clause is not a waiver of the right to proceed in court. If the "right to sue" means a right to pursue an action in court, the agreement at issue here unquestionably waives it.

V. Recognizing the Application of the Non-Waiver Provision to Predispute Arbitration Agreements Will Not Have Adverse Consequences.

CompuCredit complains that if a predispute arbitration agreement is a prohibited waiver of the right to sue under CROA, then merely offering a consumer a contract containing such an agreement would violate CROA. As CompuCredit points out, the statute not only makes waivers of rights void and unenforceable, but also provides that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter shall be treated as a violation of this subchapter." 15 U.S.C. § 1679f(b). Thus, an attempt to obtain a waiver of the right to sue would, as CompuCredit says, violate the statute.

That consequence is no reason to limit the scope of the non-waiver provision. Section 1679f(b) reflects

Congress's unambiguous intent to treat attempting to obtain an invalid waiver as a violation of the statute. There is no doubt that merely proffering a contract that purports to waive the consumer's right to cancel under § 1679e or the protections of § 1679d (which requires that all credit repair contracts contain specified terms) or § 1679b(b) (which prohibits advance payment for credit repair services) violates CROA. There is no reason to place proffering a contract that asks a consumer to waive her right to sue on a different footing.[19]

Nor is it true, as CompuCredit suggests, that giving effect to the statute's prohibition on waiving the right to sue will necessarily render settlement agreements or post-dispute arbitration agreements (or offers to enter into such agreements) impermissible. This Court has long distinguished between predispute waivers of statutory rights and post-dispute settlements. Thus, in *Callen v. Pennsylvania Railroad Co.*, the Court held that a post-dispute settlement agreement does not violate the non-waiver provision of the Federal Employers' Liability Act (FELA) because "a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility," and thus "[w]here controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." 332 U.S. at 631. Similarly, in *Boyd v. Grand Trunk West-*

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[19] The statute would not prohibit proffering a contract with a predispute arbitration clause that *excluded* statutory claims under CROA, because the statute prohibits only waiver of the right to sue for a violation of CROA.

ern Railroad Co., the Court held that an employee's nonwaivable FELA right to "elect judicial trial of his cause" invalidated an agreement limiting the venue in which a claim could be brought, but the Court reiterated that a "compromise enabling the parties to settle their dispute without litigation" is not an invalid waiver. 338 U.S. 263, 266 (1949). Likewise, an agreement to settle an existing CROA claim for consideration (or an agreement to settle it through arbitration), unlike a predispute arbitration agreement, does not prospectively cut off a consumer's right to sue. Rather, as the Court put it in *Callen*, a post-dispute agreement recognizes the possibility of suit by compromising a suit that could otherwise be brought.

Thus, when *Wilko v. Swan* held that the Securities Act of 1933 created a non-waivable right to sue that precluded enforcement of a predispute arbitration agreement, the Court, citing *Callen*, limited its holding to arbitration agreements made "prior to the existence of a controversy." 346 U.S. at 438. "[A] waiver in advance of a controversy," the Court stated, "stands upon a different footing" than a post-dispute agreement to arbitrate. *Id.* In *McMahon* and *Rodriguez de Quijas*, the Court rejected *Wilko*'s premise that the securities laws create a non-waivable right to sue, but noted with approval *Wilko*'s indication (followed "uniformly" by the lower courts) that even a non-waivable right to sue would not forbid submission of a *pending* dispute to arbitration. *Rodriguez de Quijas*, 490 U.S. at 480 n.*; *McMahon*, 482 U.S. at 233.

In light of this history of judicial construction of statutory non-waiver provisions, the Congress that enacted CROA would likely have understood that it was supplying the statutory terms that the Court had

found lacking in *Rodriguez de Quijas* and *McMahon* to create a non-waivable right to sue. In this way, Congress was making predispute but not post-dispute arbitration agreements unenforceable, consistent with *Wilko*'s view of the effect of a non-waivable right to sue.

Such a view of the statute is consistent with CROA's overall focus on ensuring the fairness of contracts for services between credit repair organizations and consumers and the accuracy of the representations and disclosures that lead up to those contracts. The statutory findings enacted by Congress refer to the inequality of bargaining power between credit repair organizations and "consumers, particularly those of limited economic means and who are inexperienced in credit matters." 15 U.S.C. § 1679(a)(2). CROA remedies that inequality by protecting "prospective buyers of the services of credit repair organizations." *Id.* § 1679(b)(1). The statute accordingly provides for disclosures to consumers (including the right-to-sue disclosure) before they enter into service agreements with credit repair organizations, § 1679c; prohibits advance payment for services, § 1679b(b); requires written service contracts containing specified terms, § 1679d; and gives customers the right to cancel any service contract within three days of signing it, § 1679e. Section 1679f, too, shares this focus on the contractual relations between credit repair organizations and their customers: Subsection (c) of § 1679f, which immediately follows the prohibitions on waivers and requests for waivers, provides that "any contract for services" that does not comply with CROA shall be void.

The Act's focus on the fairness of the formation and terms of consumer agreements with credit repair organizations supports reading its prohibition on waivers of the right to sue to apply to predispute arbitration agreements contained in such contracts, but not necessarily to settlements of existing disputes, including agreements to resolve them through arbitration. Predispute arbitration agreements contained in contracts of adhesion proffered to consumers—particularly the economically vulnerable consumers likely to perceive a need to repair their credit—are unlikely to reflect genuine consumer choice. *Cf. Concepcion*, 131 S. Ct. at 1750 (recognizing the adhesive nature of consumer contracts). Thus, it made eminent sense for a Congress that desired to "address[] the concerns that attend contracts of adhesion" (*id.* at 1750 n.6) to protect vulnerable consumers against signing away their future right to sue for violations of CROA in the very contracts that define their relationship with a credit repair organization.

By contrast, once a consumer comes forward with a claim that CROA has been violated, an agreement to settle that claim or submit it to arbitration is much less likely to reflect overreaching by the defendant or the effects of an uneven playing field, particularly when the claimant has counsel and the ability to go to court to seek actual and punitive damages and fees absent an agreement. A claimant in such circumstances "will submit a dispute to arbitration only when fully apprised of his rights by counsel and only if he considers it the most advantageous method for determining the particular claim." Note, *Enforceability of Arbitration Agreements in Fraud Actions Under the Securities Act*, 62 Yale L.J. 985, 996 (1953). Moreover, post-dispute arbitration submissions do not im-

pair the statutory purpose of deterring misconduct by credit repair organizations because, absent a predispute arbitration agreement, potential defendants know that their customers retain "the full battery of [statutory] remedies and forums." *Id.* In short, "the arguments and considerations which preclude the validity of an agreement to arbitrate future disputes are generally inapplicable to an agreement to arbitrate existing disputes." *Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 246 (3d Cir. 1968), *cited in McMahon*, 482 U.S. at 233.

But even if the statute were not so readily open to an interpretation differentiating predispute waivers from post-dispute submissions to arbitration, the Court should not disregard the prohibition on waivers of the right to sue out of concern for the possible consequences in cases involving post-dispute arbitration agreements. As this Court has repeatedly stated, "[i]t is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). That a statutory provision foreclosing waiver of the right to sue ~~might~~ apply to post-dispute arbitration submissions would not be an absurd consequence, let alone one "so absurd" (*Heintz v. Jenkins*, 514 U.S. 291, 295 (1995)) that the Court is compelled to avoid any statutory construction that might point in that direction.

After all, applying non-waiver provisions to post-dispute agreements is not unheard of. This Court has, where the text commanded it, applied statutory non-waiver provisions to post-dispute settlement agree-

ments. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998) (construing the waiver provision of the OWBPA, whose express terms indicate it applies to settlement of litigation, *see* 29 U.S.C. § 626(f)(2)). Even absent an express statutory non-waiver provision, the Court has held that some statutory rights (such as the right of employees to receive wages required under the Fair Labor Standards Act) may not be waived in settlement of an existing dispute. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945).

Here, there is no reason to think that the ability to enter into a post-dispute agreement to arbitrate a claim under § 1679g of CROA would be of particular importance to large numbers of CROA plaintiffs. Therefore, a perceived need to preserve the enforceability of such agreements should not drive the Court's construction of the non-waiver provision. And the possibility that the Court's decision might affect post-dispute agreements does not justify the significant distortion of CROA's language that would be necessary to hold that CROA permits waiving the right to sue through a predispute arbitration agreement.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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APPENDIX

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Credit Repair Organizations Act, 15 U.S.C. § 1679-1679j

Sec. 1679. Findings and purposes

(a) Findings

The Congress makes the following findings:

(1) Consumers have a vital interest in establishing and maintaining their credit worthiness and credit standing in order to obtain and use credit. As a result, consumers who have experienced credit problems may seek assistance from credit repair organizations which offer to improve the credit standing of such consumers.

(2) Certain advertising and business practices of some companies engaged in the business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters.

(b) Purposes

The purposes of this subchapter are--

(1) to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services; and

(2) to protect the public from unfair or deceptive advertising and business practices by credit repair organizations.

Sec. 1679a. Definitions

For purposes of this subchapter, the following definitions apply:

(1) Consumer

The term "consumer" means an individual.

(2) Consumer credit transaction

The term "consumer credit transaction" means any transaction in which credit is offered or extended to an individual for personal, family, or household purposes.

(3) Credit repair organization

The term "credit repair organization"—

(A) means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of—

(i) improving any consumer's credit record, credit history, or credit rating; or

(ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i); and

(B) does not include—

(i) any nonprofit organization which is exempt from taxation under section 501(c)(3) of title 26;

(ii) any creditor (as defined in section 1602 of this title), with respect to any consumer, to the extent the creditor is assisting

the consumer to restructure any debt owed by the consumer to the creditor; or

(iii) any depository institution (as that term is defined in section 1813 of title 12) or any Federal or State credit union (as those terms are defined in section 1752 of title 12), or any affiliate or subsidiary of such a depository institution or credit union.

(4) Credit

The term "credit" has the meaning given to such term in section 1602(e) of this title.

Sec. 1679b. Prohibited practices

(a) In general

No person may—

(1) make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading (or which, upon the exercise of reasonable care, should be known by the credit repair organization, officer, employee, agent, or other person to be untrue or misleading) with respect to any consumer's credit worthiness, credit standing, or credit capacity to—

(A) any consumer reporting agency (as defined in section 1681a(f) of this title); or

(B) any person—

(i) who has extended credit to the consumer; or

(ii) to whom the consumer has applied or is applying for an extension of credit;

(2) make any statement, or counsel or advise any consumer to make any statement, the intended effect of which is to alter the consumer's identification to prevent the display of the consumer's credit record, history, or rating for the purpose of concealing adverse information that is accurate and not obsolete to—

(A) any consumer reporting agency;

(B) any person—

(i) who has extended credit to the consumer; or

(ii) to whom the consumer has applied or is applying for an extension of credit;

(3) make or use any untrue or misleading representation of the services of the credit repair organization; or

(4) engage, directly or indirectly, in any act, practice, or course of business that constitutes or results in the commission of, or an attempt to commit, a fraud or deception on any person in connection with the offer or sale of the services of the credit repair organization.

(b) Payment in advance

No credit repair organization may charge or receive any money or other valuable consideration for the performance of any service which the credit repair organization has agreed to perform for any consumer before such service is fully performed.

Sec. 1679c. Disclosures

(a) Disclosure required

Any credit repair organization shall provide any consumer with the following written statement before any contract or agreement between the consumer and the credit repair organization is executed:

"Consumer Credit File Rights Under State and Federal Law

"You have a right to dispute inaccurate information in your credit report by contacting the credit bureau directly. However, neither you nor any 'credit repair' company or credit repair organization has the right to have accurate, current, and verifiable information removed from your credit report. The credit bureau must remove accurate, negative information from your report only if it is over 7 years old. Bankruptcy information can be reported for 10 years.

"You have a right to obtain a copy of your credit report from a credit bureau. You may be charged a reasonable fee. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The credit bureau must provide someone to help you interpret the information in your credit file. You are entitled to receive a free copy of your credit report if you are unemployed and intend to apply for employment in the next 60 days, if you are a recipient of public welfare assistance, or if you have reason to believe that there is inaccurate information in your credit report due to fraud.

"You have a right to sue a credit repair organization that violates the Credit Repair Organization Act.

This law prohibits deceptive practices by credit repair organizations.

"You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it.

"Credit bureaus are required to follow reasonable procedures to ensure that the information they report is accurate. However, mistakes may occur.

"You may, on your own, notify a credit bureau in writing that you dispute the accuracy of information in your credit file. The credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information. The credit bureau may not charge any fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the credit bureau.

"If the credit bureau's reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the credit bureau, to be kept in your file, explaining why you think the record is inaccurate. The credit bureau must include a summary of your statement about disputed information with any report it issues about you.

"The Federal Trade Commission regulates credit bureaus and credit repair organizations. For more information contact:

"The Public Reference Branch
"Federal Trade Commission
Washington, D.C. 20580".

(b) Separate statement requirement

The written statement required under this section shall be provided as a document which is separate from any written contract or other agreement be-

tween the credit repair organization and the consumer or any other written material provided to the consumer.

(c) Retention of compliance records

(1) In general

The credit repair organization shall maintain a copy of the statement signed by the consumer acknowledging receipt of the statement.

(2) Maintenance for 2 years

The copy of any consumer's statement shall be maintained in the organization's files for 2 years after the date on which the statement is signed by the consumer.

Sec. 1679d. Credit repair organizations contracts

(a) Written contracts required

No services may be provided by any credit repair organization for any consumer—

(1) unless a written and dated contract (for the purchase of such services) which meets the requirements of subsection (b) of this section has been signed by the consumer; or

(2) before the end of the 3-business-day period beginning on the date the contract is signed.

(b) Terms and conditions of contract

No contract referred to in subsection (a) of this section meets the requirements of this subsection unless such contract includes (in writing)—

(1) the terms and conditions of payment, including the total amount of all payments to be made by the consumer to the credit repair organization or to any other person;

(2) a full and detailed description of the services to be performed by the credit repair organization for the consumer, including—

(A) all guarantees of performance; and

(B) an estimate of—

(i) the date by which the performance of the services (to be performed by the credit repair organization or any other person) will be complete; or

(ii) the length of the period necessary to perform such services;

(3) the credit repair organization's name and principal business address; and

(4) a conspicuous statement in bold face type, in immediate proximity to the space reserved for the consumer's signature on the contract, which reads as follows: "You may cancel this contract without penalty or obligation at any time before midnight of the 3rd business day after the date on which you signed the contract. See the attached notice of cancellation form for an explanation of this right."

Sec. 1679e. Right to cancel contract

(a) In general

Any consumer may cancel any contract with any credit repair organization without penalty or obliga-

tion by notifying the credit repair organization of the consumer's intention to do so at any time before midnight of the 3rd business day which begins after the date on which the contract or agreement between the consumer and the credit repair organization is executed or would, but for this subsection, become enforceable against the parties.

(b) Cancellation form and other information

Each contract shall be accompanied by a form, in duplicate, which has the heading "Notice of Cancellation" and contains in bold face type the following statement:

> "You may cancel this contract, without any penalty or obligation, at any time before midnight of the 3rd day which begins after the date the contract is signed by you.
>
> "To cancel this contract, mail or deliver a signed, dated copy of this cancellation notice, or any other written notice to [name of credit repair organization] at [address of credit repair organization] before midnight on [date]
>
> "I hereby cancel this transaction,
>
> [date]
>
> [purchaser's signature]."

(c) Consumer copy of contract required

Any consumer who enters into any contract with any credit repair organization shall be given, by the organization—

> (1) a copy of the completed contract and the disclosure statement required under section 1679c of this title; and

(2) a copy of any other document the credit repair organization requires the consumer to sign, at the time the contract or the other document is signed.

Sec. 1679f. Noncompliance with this subchapter

(a) Consumer waivers invalid

Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.

(b) Attempt to obtain waiver

Any attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this subchapter shall be treated as a violation of this subchapter.

(c) Contracts not in compliance

Any contract for services which does not comply with the applicable provisions of this subchapter—

(1) shall be treated as void; and

(2) may not be enforced by any Federal or State court or any other person.

ec. 1679g. Civil liability

a) Liability established

Any person who fails to comply with any provision f this subchapter with respect to any other person hall be liable to such person in an amount equal to he sum of the amounts determined under each of the ollowing paragraphs:

(1) Actual damages

The greater of—

(A) the amount of any actual damage sustained by such person as a result of such failure; or

(B) any amount paid by the person to the credit repair organization.

(2) Punitive damages

(A) Individual actions

In the case of any action by an individual, such additional amount as the court may allow.

(B) Class actions

In the case of a class action, the sum of—

(i) the aggregate of the amount which the court may allow for each named plaintiff; and

(ii) the aggregate of the amount which the court may allow for each other class member, without regard to any minimum individual recovery.

(3) Attorneys' fees

In the case of any successful action to enforce any liability under paragraph (1) or (2), the costs

of the action, together with reasonable attorneys' fees.

(b) Factors to be considered in awarding punitive damages

In determining the amount of any liability of any credit repair organization under subsection (a)(2) of this section, the court shall consider, among other relevant factors—

(1) the frequency and persistence of noncompliance by the credit repair organization;

(2) the nature of the noncompliance;

(3) the extent to which such noncompliance was intentional; and

(4) in the case of any class action, the number of consumers adversely affected.

Sec. 1679h. Administrative enforcement

(a) In general

Compliance with the requirements imposed under this subchapter with respect to credit repair organizations shall be enforced under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] by the Federal Trade Commission.

(b) Violations of this subchapter treated as violations of Federal Trade Commission Act

(1) In general

For the purpose of the exercise by the Federal Trade Commission of the Commission's functions and powers under the Federal Trade Commission Act [15 U.S.C. 41 et seq.], any violation of any re-

quirement or prohibition imposed under this subchapter with respect to credit repair organizations shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C. 45(a)].

(2) Enforcement authority under other law

All functions and powers of the Federal Trade Commission under the Federal Trade Commission Act shall be available to the Commission to enforce compliance with this subchapter by any person subject to enforcement by the Federal Trade Commission pursuant to this subsection, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of any Federal Trade Commission trade regulation rule, without regard to whether the credit repair organization—

(A) is engaged in commerce; or

(B) meets any other jurisdictional tests in the Federal Trade Commission Act.

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, whenever the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this subchapter, the State—

(A) may bring an action to enjoin such violation;

(B) may bring an action on behalf of its residents to recover damages for which the person

is liable to such residents under section 1679g of this title as a result of the violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Commission

(A) Notice to Commission

The State shall serve prior written notice of any civil action under paragraph (1) upon the Federal Trade Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action.

(B) Intervention

The Commission shall have the right—

(i) to intervene in any action referred to in subparagraph (A);

(ii) upon so intervening, to be heard on all matters arising in the action; and

(iii) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance

of witnesses or the production of documentary and other evidence.

(4) Limitation

Whenever the Federal Trade Commission has instituted a civil action for violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission for any violation of this subchapter that is alleged in that complaint.

Sec. 1679i. Statute of limitations

Any action to enforce any liability under this subchapter may be brought before the later of—

(1) the end of the 5-year period beginning on the date of the occurrence of the violation involved; or

(2) in any case in which any credit repair organization has materially and willfully misrepresented any information which—

(A) the credit repair organization is required, by any provision of this subchapter, to disclose to any consumer; and

(B) is material to the establishment of the credit repair organization's liability to the consumer under this subchapter,

the end of the 5-year period beginning on the date of the discovery by the consumer of the misrepresentation.

Sec. 1679j. Relation to State law

This subchapter shall not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with any law of any State except to the extent that such law is inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

REPLY BRIEF

RECORD
AND
BRIEFS

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IN THE

Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
Petitioners,

v.

WANDA GREENWOOD *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

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INTRODUCTION

The Federal Arbitration Act (FAA) codifies the liberal federal policy favoring enforcement of arbitration agreements. Over the past 25 years, this Court has repeatedly explained that, pursuant to the FAA, agreements to arbitrate statutory causes of action are fully enforceable absent explicit direction by Congress to the contrary. When Congress intends to preclude arbitration of statutory claims, it therefore does so directly and expressly.

Congress gave no such indication in the Credit Repair Organizations Act (CROA). The CROA's terms make no mention of the subject of arbitration, much less any intent to preclude arbitration. The legislative history likewise contains no reference, even a passing one, to arbitration. And plaintiffs make no effort to identify anything in the CROA's purposes inherently inconsistent with arbitration. Under the FAA and this Court's precedents, the CROA's silence concerning arbitration can lead only to one conclusion—valid agreements to arbitrate CROA claims are fully enforceable.

ARGUMENT

I. The FAA And This Court's Precedents Require A Clear Congressional Statement To Overcome The Strong Federal Policy Favoring Arbitration

A. According to respondents, the question "whether a federal statute exempts claims from arbitration" should be decided without regard to any "policy favoring arbitration." Resp. Br. 10, 14. Respondents are decidedly wrong.

This Court has repeatedly emphasized that the FAA "embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). And the FAA's "liberal federal policy favoring arbitration agreements," *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000) (quotation omitted), fully applies "when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

While the FAA's strong federal policy favoring arbitration "may be overridden by a contrary congressional command," *id*, this Court's precedents require Congress to speak clearly when issuing any such "command." Accordingly, the "burden is on the party opposing arbitration ... to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 227. "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *McMahon*, 482 U.S. at 227). "Throughout such an inquiry, it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). And "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

Applying those principles, this Court has held that—at least when there is no "inherent conflict" between arbitration and the purposes of the relevant statute—statutory claims are arbitrable when "nothing in the text of the [statute] or its legislative history *explicitly* precludes arbitration." *Gilmer*, 500 U.S. at 26 (emphasis added).

B. Respondents would have the Court disregard those established principles. In contending that the Court should resolve this case without regard to the FAA's strong policy favoring arbitration, respondents rely (Resp. Br. 10, 14) on a footnote in this Court's opinion in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 n.9 (2009). *Pyett*, however, affords no basis for departing from the established rule "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26 (quotation omitted). To the contrary, *Pyett* strongly reaffirms *Gilmer* and its requirement that the Court will read a statute to preclude arbitration only if Congress makes any such intention unmistakably clear.

Pyett addressed the enforceability of a term in a collective bargaining agreement requiring arbitration of ADEA claims. The Court in *Gilmer* had already upheld the enforceability of agreements to arbitrate ADEA claims. *Pyett*, relying on *Gilmer*, held that arbitration provisions in collective bargaining agreements are no different. 129 S. Ct. at 1465-66. Far from overruling or distinguishing *Gilmer*, *Pyett* strongly reaffirmed it.

In the footnote on which respondents rely, the Court denied Justice Stevens's suggestion, in dissent,

that the *Court itself* possessed a "preference for arbitration" or had *itself* fashioned a "policy favoring arbitration." *See id.* at 1470 n.9. That observation is of no consequence here: the policy favoring arbitration is one established by *Congress* (in the FAA), not the Court. As the Court explained in the same footnote, "it is the Court's fidelity to the ADEA's text—not an alleged preference for arbitration—that dictates the answer to the question presented." *Id.* And the Court upheld the enforceability of agreements to arbitrate claims under the antidiscrimination statutes at issue because, as *Gilmer* had explained, "nothing in the text of Title VII or the ADEA precludes contractual arbitration." *Id.*

Thus, like *Gilmer* before it, *Pyett* stands for the proposition—by now well settled—that Congress will be found to have precluded arbitration of claims under a given statute only if it makes its intention "explicitly" clear. *Gilmer*, 500 U.S. at 26. Congress did not do so in the CROA.

II. Nothing In The CROA Overcomes The Strong Policy Favoring Arbitration

A. The CROA's Silence Concerning Arbitration Compels The Conclusion That CROA Claims Are Fully Arbitrable

The CROA contains no explicit indication of an intention to preclude arbitration. Indeed, the statute contains no mention of arbitration at all. The inescapable conclusion from Congress's silence is that CROA claims are subject to arbitration.

1. Congress's silence in the CROA is particularly deafening when contrasted with the numerous provisions in which Congress, when electing to preclude arbitration of a statutory claim, has done so directly and explicitly, as this Court's precedents require. Pet. Br. 19-21 (citing provisions). Respondents question the relevance of those provisions on the basis that none was enacted before 2002, while the CROA was enacted in 1996. Resp. Br. 28-29. By the time of the CROA's enactment, however, this Court had long established the strong presumption favoring arbitrability of federal statutory claims and the resulting need to make clear any intention to overcome that presumption. *See, e.g.*, *Gilmer*, 500 U.S. 20 (1991) (ADEA claims arbitrable); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act actions arbitrable); *McMahon*, 482 U.S. 220 (1987) (Exchange Act and RICO claims subject to arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims arbitrable).

Congress is presumed to have been aware of this Court's requirements when it enacted the CROA. *See, e.g.*, *Porter v. Nussle*, 534 U.S. 516, 528 (2002). Indeed, proposed legislation in the 104th Congress—the Congress that enacted the CROA—confirms Congress's full awareness at that time of the need to make explicit any intention to preclude arbitration, and even of this Court's specific precedents establishing that requirement.[1] Accordingly, if the Congress

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[1] *See, e.g.*, Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong. §§ 2-8 (bill to amend the major civil rights statutes in response to *Gilmer*, by stating that those acts'

that enacted the CROA intended to preclude arbitration of CROA claims, it could have (and would have) included an explicit statement to that effect, just as various contemporaneous bills did, and just as later Congresses did in enacted legislation.

2. Respondents would equate the CROA with laws in which Congress directly and explicitly precluded the enforceability of predispute arbitration agreements. *E.g.*, 15 U.S.C. § 1226(a)(2) (enacted in 2002) (providing that, where contract "provides for the use of arbitration to resolve a controversy, ... arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy"). There is no basis for treating Congress as if it manifested the same intention in the CROA even though Congress made no mention of arbitration in the statute.

Respondents argue that the CROA nonetheless achieves the same result through the interaction of "[t]hree interlocking provisions," Resp. Br. 14-15: (i) the civil-liability provision, 15 U.S.C. § 1679g, which

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judicial remedies "shall be the exclusive powers and procedures applicable to such claim" unless the parties agree to arbitration *post*-dispute); H.R. 3967, 104th Cong. § 1 (bill responding to *Mitsubishi Motors*, which had been decided on July 2, 1985, stating, "Notwithstanding any other provision of law," any person who has entered an arbitration agreement before July 1, 1985, "shall not be barred from bringing an action in any court of competent jurisdiction in the United States ...."); Fairness and Voluntary Arbitration Act of 1996, H.R. 3422, 104th Cong. § 2 (bill to amend FAA by allowing parties to "sales and service contracts" that require arbitration to reject arbitration after dispute arises).

creates a cause of action that respondents say establishes an exclusively judicial forum; (ii) the disclosure provision, *id.* § 1679c(a), which describes that cause of action as a "right to sue" when setting forth a mandatory disclosure to lay consumers; and (iii) the anti-waiver provision, § 1679f(a), which renders void and unenforceable any "waiver by a consumer of ... any right of the consumer." According to respondents, those three provisions, when read together, establish an exclusively judicial forum that cannot be waived through an arbitration agreement.

Respondents' argument is meritless. Congress does not preclude arbitration in such an elliptical manner. Rather it must do so (and repeatedly has done so) "explicitly." *Gilmer*, 500 U.S. at 26. Congress, in short, should not be considered to have overridden the FAA's strong policy "in such a backhanded way." *Bd. of Trustees v. Roche Molecular Sys.*, 131 S. Ct. 2188, 2197 n.5 (2011).

B. The CROA's Anti-Waiver And Civil-Liability Provisions Do Not Bar Enforcement Of A Valid Arbitration Agreement

Even apart from the absence of any mention of arbitration in the CROA, respondents' analysis of the CROA's "interlocking provisions" is fundamentally flawed. Those provisions, properly understood, do not establish any non-waivable entitlement to a judicial forum.

1. *Assuming The CROA Creates A Right To Sue Exclusively In Court, That Right May Be Waived Pursuant To A Valid Arbitration Agreement*

Assuming, *arguendo*, that the CROA's civil-liability provision establishes a right to sue exclusively in court, the statute's anti-waiver provision poses no bar to a voluntary waiver of that right through a valid arbitration agreement. The anti-waiver provision prevents waiver only of substantive rights established by the statute, not procedural rights like the (supposed) right to sue exclusively in court. Respondents' argument to the contrary cannot be squared with the statutory text or with this Court's decisions.

a. The CROA's anti-waiver provision states that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under [the CROA] ... shall be treated as void[,] and may not be enforced by any Federal or State court or any other person." 15 U.S.C. § 1679f(a). In respondents' view, the "rights" protected by the anti-waiver provision must include the judicial remedy created by the CROA's civil-liability provision because: the disclosure provision labels that remedy a "*right* to sue," the anti-waiver provision refers to "*any right* of the consumer," and "the use of the word 'any' to modify a noun 'suggests a broad meaning.'" Resp. Br. 35 (quoting *Ali v. Bureau of Prisons*, 552 U.S. 214, 219 (2008)).

Respondents err in presuming that the anti-waiver provision's use of the word "any" in reference

to the "rights" within its sweep necessarily means that the provision reaches beyond substantive "rights." *See Small v. United States*, 544 U.S. 385, 388 (2005) ("The word 'any' considered alone cannot answer [the] question" whether "any court" includes a "foreign court."). As the Court has explained, "general words" like "any" must "be limited" in their application "to those objects to which the legislature intended to apply them." *United States v. Palmer*, 3 Wheat. 610, 631 (1818) (Marshall, C.J.). The term "any right," while a "catchall" phrase, does not "define what it catches." *Flora v. United States*, 362 U.S. 145, 149 (1960) (interpreting "any sum"). The breadth of the term "any right," as any other statutory term, thus depends on the "context in which [it] is used." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)) (alteration in original).

The context here dictates concluding that the "rights of the consumer" referenced in the anti-waiver provision are confined to substantive CROA rights. The relevant context is supplied by the FAA. This Court has long recognized that, in light of the FAA, a waiver of the right to seek a judicial remedy is distinct from a waiver of substantive rights: "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

The FAA requires construing the CROA's anti-waiver provision "with a healthy regard for the federal policy favoring arbitration." *Id.* (quotation omit-

ted). Doing so compels reading the anti-waiver provision to apply to substantive rights under the CROA, not procedural rights. Indeed, this Court has already construed a materially identical anti-waiver provision to encompass only substantive rights, and thus to pose no bar to enforcement of an arbitration agreement. The Court need only apply that same understanding in this case.

In *Gilmer*, this Court considered the arbitrability of claims under the ADEA, which contains an anti-waiver provision that states: "An individual may not waive *any right* or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum ... (C) the individual *does not waive rights* or claims that may arise after the date the waiver is executed." 29 U.S.C. § 626(f)(1) (emphasis added). The ADEA, like the CROA, thus contains an anti-waiver provision that speaks in terms of the waiver of "any right." Moreover, the ADEA, like the CROA, contains a separate provision establishing a right of action, *i.e.*, a right to sue. *See* 29 U.S.C. § 626(c)(1). Yet this Court held that the ADEA's anti-waiver provision does not preclude arbitration. *Gilmer*, 500 U.S. at 28 n.3, 29; Pet. Br. 33. And this Court reaffirmed in *Pyett* that the ADEA's anti-waiver provision precludes only waivers of "substantive" rights, and that the "*right to a judicial forum is not the nonwaivable 'substantive' right protected by the ADEA.*" 129 S. Ct. at 1464 n.5 (emphasis added); *see also id.* at 1465, 1469.

Respondents attempt to distinguish the ADEA on the ground that, whereas the CROA characterizes its cause of action as a "right to sue" in the disclosure provision, the ADEA "nowhere expressly provides that the entitlement to bring an action in court is a 'right' within the meaning of the waiver provision." Resp. Br. 32, 34. That asserted distinction is illusory. The "right to sue" language in the CROA's disclosure provision is merely a plain-English description for lay consumers of the CROA's cause of action. Respondents do not dispute that any cause of action in the U.S. Code—including the one in the ADEA—is properly described as a "right to sue." The ADEA contains no express description of its cause-of-action provision as a "right to sue" only because the ADEA—unlike the CROA—contains no verbatim required disclosure to employees of their rights. But if the ADEA did require such a disclosure, one of its terms would presumably be that "You have the right to sue your employer for violations of the Age Discrimination in Employment Act." The existence of such a required disclosure would not in any way change the meaning of the ADEA's anti-waiver provision such that it would preclude arbitration. That is dispositive here.

Accordingly, just as this Court has read the ADEA's anti-waiver provision to encompass waiver only of substantive rights, the CROA's parallel anti-waiver provision should be read to encompass only waiver of substantive rights. The CROA's anti-waiver provision thus poses no obstacle to the enforcement of agreements to arbitrate CROA claims.

b. The conclusion that the CROA's anti-waiver provision does not preclude arbitration of CROA claims is reinforced by other language in that provision, *viz.*, that waivers "may not be enforced by any Federal or State court or *any other person*." 15 U.S.C. § 1679f(a)(2) (emphasis added). The emphasized language confirms that Congress fully expected arbitrators to play a role in enforcing the CROA.

Respondents contend that "any other person" does not refer to an arbitrator. Rather, respondents assert, the "term could easily encompass an administrative agency officer, or even a private person or company attempting to enforce a waiver through litigation." Resp. Br. 42. In fact, the term could not encompass such actors. Under the principle of *ejusdem generis*, "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration" *Norfolk & W. R.R. Co. v. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991). The "any other person" language therefore must be read in light of its statutory neighbors—"any Federal or State court." Those terms demonstrate that "any other person" addresses persons, like federal and state courts, who adjudicate private claims involving CROA rights. Arbitrators fall within that category. In contrast, the phrase "any other person" does not comfortably encompass administrative agency officials, who might *bring* actions involving CROA rights, *see, e.g.*, 15 U.S.C. § 1679h, but would not normally adjudicate such actions. And it certainly does not include litigating parties, who play no role in adjudicating CROA rights. In all events, even if plaintiffs were correct

that "any other person" *can* include all the actors it identifies, there is no basis for *excluding* arbitrators.

Respondents also contend—following the Ninth Circuit below, Pet. App. 15a—that, even if the "any other person" language does include arbitrators, "the possibility that an arbitrator might be in a position to decide whether to enforce a waiver of rights under CROA could arise in any number of circumstances other than compelled arbitration of a consumer's CROA claims"—for instance, if a "credit repair organization ... demand[s] arbitration against a consumer to collect a payment for services allegedly due under its contract." Resp. Br. 42; *see* Resp. Br. 42-44. Anything is possible, but as petitioners have explained (Pet. Br. 30-31), the far more natural reading of "any other person" is simply that Congress assumed arbitrators would in some circumstances adjudicate CROA claims, and sought to assure that arbitrators, like courts, would not enforce waivers of *substantive* CROA rights.

Respondents' contrary reading is particularly unpersuasive in light of the strong federal policy favoring arbitration, and of Congress's demonstrated awareness of how to prohibit arbitration directly and explicitly when intending to do so. If Congress in fact sought to preclude enforcement of arbitration agreements in a provision that *affirmatively contemplates arbitration*, Congress would make its intention to do so expressly clear.

c. The anti-waiver provision's relationship with a neighboring provision confirms the conclusion that the CROA does not preclude enforcement of arbitration agreements. Section 1679f(b) renders any at-

tempt to obtain a waiver of "any right of the consumer" referenced in subsection (a) a violation of the CROA. 15 U.S.C. § 1679f(b). Respondents readily admit that, under that provision, merely presenting a consumer with a pre-dispute arbitration agreement would subject a credit repair organization to compensatory and punitive damages and FTC enforcement. Resp. Br. 50-51 & n.19. On respondents' view, therefore, a consumer could successfully sue a credit repair organization under the CROA for even *proposing* a contract that includes a generic arbitration agreement, unless that agreement *expressly* excluded CROA claims. Resp. Br. 51 n.19.

Respondents cite no similar provision in the U.S. Code, and the result they contemplate would be truly extraordinary. It is one thing for Congress to preclude *enforcement* of pre-dispute arbitration agreements. It is quite another to render the mere offer of such an agreement a *violation of federal law*.

Indeed, respondents' position is even more far-reaching than that. Respondents cannot rule out the possibility that the offer of *post*-dispute agreements to arbitrate—or even to *settle*—CROA claims would be unenforceable and a violation of the CROA. Resp. Br. 51-56. Respondents provide no textual basis for distinguishing between pre- and post-disputes waivers of "any right of the consumer."[2] Respondents also

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[2] The three cases upon which respondents rely provide no support for drawing any such distinction here. Two of those cases held that railroads are not precluded from settling claims brought under the Federal Employers' Liability Act (FELA) because FELA only precludes a railroad from "exempt[ing] itself from any *liability* created by" that Act, 45 U.S.C. § 55 (emphasis added), and a settlement release "is not a device to exempt from

argue that it would not be unprecedented to treat an agreement to settle certain aspects of a claim as unenforceable. Resp. Br. 55-56. But the sole case respondents cite for that proposition concerned a former employee's post-termination release of an employer from *future* claims against the employer, which the Court held to violate the plain terms of the ADEA's anti-waiver provision—the same provision this Court has held *does not* preclude enforcement of arbitration agreements. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 423-24, 425-28 (1998); 29 U.S.C. § 626(f)(1) ("An individual may not waive any right *or claim* .... (emphasis added)). *Oubre* did not concern an attempt to settle existing litigation. And in any event, respondents do not purport to provide an example of a statute that would treat a post-dispute offer of settlement as a *violation of law*. This Court should avoid any reading of the CROA under which the mere offer to settle a CROA claim could raise the prospect of compensatory and punitive damages and FTC enforcement. Congress cannot be seen to have intended that unprecedented result without saying so directly and unambiguously.

d. Respondents' remaining textual arguments in support of their reading of the anti-waiver provision

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liability ...." *Callen v. Pa. R.R. Co.*, 332 U.S. 625, 631 (1948); *see also Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949). There is no similar textual support in the CROA for the distinction respondents seek to draw. The third case, *Wilko v. Swan*, 346 U.S. 427 (1953), relied on no text at all to support the proposition that "waiver in advance of a controversy stands upon a different footing" than agreements to arbitrate. *Id.* at 438. And as respondents acknowledge, *Wilko* was expressly overruled in *McMahon* and *Rodriguez de Quijas*. Resp. Br. 52.

are without merit. Respondents argue that "rights of the consumer" subject to the anti-waiver provision cannot be limited to substantive rights because the anti-waiver provision also precludes waiver of "any protection provided by" the Act. The reference to "protection," respondents argue, "is most naturally read as referring to the substantive requirements of the CROA ...." Resp. Br. 36. That argument lacks merit.

In providing a list of "substantive requirements" that they believe are "protections" and not "rights," respondents include provisions prohibiting credit repair organizations from making false statements, barring them from requiring payment in advance, and requiring them to provide consumers a disclosure of rights. Resp. Br. 36. But the listed CROA provisions are just as easily described as "rights" as "protections," and in some cases much more easily described as "rights." For example, the CROA's disclosure provision (§ 1679c(a)) is naturally described as a consumer's "right" to receive a specified disclosure. It is difficult to imagine how it can be described as a "protection." (A protection against unwarned purchases of credit repair services?)

Indeed, respondents simply err in asserting that the term "protection" alone "encompasses the substantive provisions of the statute ...." Resp. Br. 36. As respondents admit (at 36-37), a consumer's entitlement to cancel a contract within 3 days is specifically labeled a "right" by the provision creating it (and not only by the disclosure provision). 15 U.S.C. § 1679e. But that right is clearly substantive. Respondents' reliance on the distinction between a

CROA "protection" and a "right" is thus misplaced. The use of both "protection" and "right" is not meant to distinguish between substantive and non-substantive CROA provisions, as respondents assert. It instead assures that the statute's scope extends to *all* substantive provisions, whether best described as a "right" or a "protection."

Respondents also suggest that several provisions in which Congress has explicitly precluded arbitration "actually reflect the concept that arbitration is a waiver of the right to sue," because some of those provisions state that "'[t]he rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment *including by a predispute arbitration agreement*.'" Resp. Br. 31 (quoting 7 U.S.C. § 26(n)(1), 12 U.S.C. § 5567(d)(1), 18 U.S.C. § 1514A(e)(1), and Pub. L. No. 111-5, § 1553(d)(1)) (emphasis and alteration in original). Those provisions demonstrate just the opposite, because the next subsection in each of the cited statutes states that "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 7 U.S.C. § 26(n)(2), 12 U.S.C. § 5567(d)(2), 18 U.S.C. § 1514A(e)(2), and American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(d)(2). If the italicized portion of the provisions respondents quote were meant to equate a prohibition of waiver of "rights and remedies" with the preclusion of arbitration, then the next subsection in each statute expressly precluding arbitration would be wholly superfluous, an impermissible inference. *See, e.g.*, *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1268 (2011).

Rather, the two statutory provisions, read together, provide (i) that purported waivers of substantive rights and remedies found in various documents, including arbitration agreements, are unenforceable, and (ii) that claims under the statute are nonarbitrable. The fact that Congress found it necessary to prevent a waiver of "rights and remedies," and then to *separately* preclude enforcement of an agreement to arbitrate, demonstrates that Congress views the concepts of a waiver of "rights and remedies" and an agreement to arbitrate as distinct, consistent with this Court's holdings in *Gilmer* and *Pyett*. *See supra* Part II.A.

e. Respondents make no effort to argue that the CROA's legislative history speaks to the question of arbitration in any respect, and respondents likewise make no contention that there is an "inherent conflict" between arbitration and the CROA's "underlying purposes." *Gilmer*, 500 U.S. at 26. Indeed, respondents suggest no reason why Congress could have desired to prevent arbitration of CROA claims. The closest they come is a passing mention of the CROA's explicit provision for class-action recoveries, which respondents state "will generally be unavailable in arbitration." Resp. Br. 47. But Congress's provision for class-action recoveries affords no grounds for supposing that Congress sought to preclude arbitration, as respondents concede: "the fact that a statutory scheme contemplates class actions may not be enough to render claims under the stat-

ute nonarbitrable ...." *Id.* (citing *Gilmer*, 500 U.S. at 32).[3]

* * * * *

Respondents thus fail to provide any sound basis—textual or otherwise—for concluding that Congress intended to preclude enforcement of agreements to arbitrate claims under the CROA. Even if there were any ambiguity on the subject—and there is not—"any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. Any doubts concerning the correct interpretation of the CROA's anti-waiver provision thus must be resolved

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[3] Respondents' amicus appears to argue that the CROA should be read to preclude arbitration because the CROA is a part of the Consumer Credit Protection Act (CCPA), 15 U.S.C. § 1601-1693r, whose intent is "'to protect consumers with respect to financial credit ....'" Brief of Amici Curiae of AARP and National Senior Citizens Law Center (AARP Br.) 34 (quoting *Clemmer v. Key Bank Nat. Ass'n*, 539 F.3d 349, 353 (6th Cir. 2008)). As this Court has explained, however, "even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions." *Green Tree*, 531 U.S. at 90 (quoting *Gilmer*, 500 U.S. at 28 (quotation omitted)). Thus, the Truth In Lending Act, 15 U.S.C. § 1601 *et seq.*, like the CROA, is meant to protect consumer credit, 15 U.S.C. § 1601, and, like the CROA, is a part of the CCPA, AARP Br. 34. Yet claims under that statute are fully arbitrable. *Green Tree*, 531 U.S. at 89-92. So too with the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq.* AARP Br. 34 (ECOA part of CCPA); *Green Tree*, 531 U.S. at 83, 89-92 (claims under that ECOA arbitrable). Claims under the CROA are no less subject to arbitration than claims under TILA and ECOA are.

in favor of arbitration. Consequently, whether or not the CROA creates a right to an exclusive judicial forum, that right may be waived through a valid arbitration agreement.

2. *The CROA's Civil-Liability Provision Does Not Establish An Exclusively Judicial Forum*

a. Respondents and their amici argue at length that the "right to sue" described in CROA's disclosure provision—and established by the CROA's civil-liability provision—means the right to bring an action in court. In their view, the CROA's civil-liability provision *must* establish a right to bring an action in court, because otherwise, the required disclosure to consumers that they have a "right to sue" would be misleading. *E.g.*, Resp. Br. 17-24; AARP Br. 8-36. Respondents' argument misses the point. There is no question that consumers have a right to sue credit repair organizations in court for CROA violations, 15 U.S.C. § 1679g, but they also have a right to choose to arbitrate CROA claims. The fact that consumers can—as respondents in this case did—voluntarily give up the right to sue in court by entering into an arbitration agreement makes no less accurate the disclosure that they have a "right to sue."

The relevant question, then, is not whether consumers have the right to sue in court—they do—but whether they can validly give up that right. The answer to that question is yes unless both of two conditions are satisfied: first, the civil-liability provision must provide that a consumer's remedy is *exclusively* judicial; and, second, that exclusive remedy must be non-waivable. For the reasons already explained, the

CROA's civil-liability provision, whatever its content, can be waived. But even if that were not so, consumers could still choose to arbitrate CROA claims because the civil-liability provision does not provide an *exclusively* judicial remedy.

Insofar as the "right to sue" language in the disclosure provision contemplates a judicial remedy, there is no basis to conclude that it establishes an *exclusively* judicial remedy. Respondents point to the language of the civil-liability provision itself, observing that it uses the terms "action" and "court." Resp. Br. 24-26. But that merely demonstrates Congress's assumption that courts would generally serve as the default venue for resolution of CROA claims, not that they would serve as the exclusive venue.[4]

b. In this regard, the CROA's civil-liability provision differs from most statutes creating a cause of action. When Congress intends to create an exclusively judicial remedy, it does so explicitly. For example, the various statutes read by this Court to allow waiver of judicial remedies nevertheless make clear that those remedies are exclusively judicial (and thus must be waived before arbitration is allowed). *See* 15 U.S.C. § 15(a) (Sherman Act) ("[A]ny person who

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[4] Respondents argue that the civil-liability provision contemplates class actions, which respondents say "are generally unavailable in arbitration." Resp. Br. 25. But class arbitration is unavailable only if the parties to an arbitration agreement voluntarily agree to make it unavailable. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744-45 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). Congress's contemplation of class actions in the CROA thus does not suggest an intention to create an exclusively judicial remedy.

shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor *in any district court of the United States* ..."); 15 U.S.C. § 77*l* (Securities Act) ("Any person who [violates particular provisions concerning securities] shall be liable ... to the person purchasing such security from him, who may sue either at law or in equity *in any court of competent jurisdiction* ..."); 15 U.S.C. § 1640(e) (Truth In Lending Act) ("Any action under this section may be brought *in any United States district court, or in any other court of competent jurisdiction* ..."); 18 U.S.C. § 1964(c) (RICO) ("Any person injured in his business or property by reason of a violation of [the RICO statute] may sue therefor *in any appropriate United States district court* ..."); 29 U.S.C. § 626(c)(1) (ADEA) ("Any person aggrieved may bring a civil action *in any court of competent jurisdiction* for such legal or equitable relief as will effectuate the purposes of this Act.") (emphases added).

In contrast to these provisions, each of which by its own terms allows suit to be brought only *in court*, the CROA's civil-liability provision contains no specification of a forum. Rather, the operative language speaks in terms of who is "liable" for what—a concept fully consistent with arbitration—and is agnostic with respect to the chosen forum: "Any person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person" in an amount calculated through a prescribed framework. 15 U.S.C. § 1679g(a). There is no basis for reading that provision to establish an exclusively judicial remedy, particularly when considered in light of the need to construe the statute to ac-

commodate—rather than preclude—arbitration. *E.g.*, *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

Accordingly, even if the CROA's anti-waiver provision precluded the waiver of the remedy found in that statute's civil-liability statute—which it does not, *see supra* Part II.B.1—the CROA's civil-liability provision does not itself prescribe an exclusively judicial remedy. Rather, the statute leaves the choice of remedy to the parties. And here, respondents elected to resolve all their claims against petitioners—including CROA claims—in arbitration. Nothing in the CROA allows respondents to avoid being held to that choice. On the contrary, the FAA establishes the courts' responsibility to "rigorously enforce agreements to arbitrate," *McMahon*, 482 U.S. at 226 (quotation and citation omitted), including this one.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 10-948

IN THE
Supreme Court of the United States

COMPUCREDIT CORP., *et al.*,
Petitioners,

v.

WANDA GREENWOOD, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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STATEMENT OF INTEREST[1]

AARP and the National Senior Citizens Law Center are organizations that represent the interests of older persons. This case involves consumer protection issues that are extremely important to seniors as users of credit. Although older people have long been considered among the most frugal and resistant to consumer debt, changing economic conditions — particularly declining pension and investment income and rising costs for basic expenses such as prescription drugs, health care, housing and utilities — have forced many older people to rely increasingly on credit to make ends meet. *See* Craig Copeland, *Debt of the Elderly and Near Elderly, 1992–2007*, 12, EBRI Notes, Vol. 30, No. 10 (Oct., 2010).

Such debt increasingly is becoming unaffordable for many older people. As older people struggle with higher medical bills and stagnant incomes, bankruptcy filings among people age 55 and older have risen sharply in recent years, with the greatest increases among those 75 and older (up 566.7% between 1991 and 2007) and those ages 65 to 74 (a 177.8% increase). Deborah Thorne, Elizabeth

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of *amicus* briefs and have filed letters reflecting their blanket consent with the Clerk.

Warren, & Teresa A. Sullivan, *Generation of Struggle*, 1, AARP Pub. Pol. Inst. (June, 2008), *available at* http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf. The age group experiencing the sharpest increase in bankruptcy filings in the period between 1991 and 2007 is the 50 and older group. *Id.* Health concerns triggered the majority of bankruptcies filed by older people (62.1% in 2007). David U. Himmelstein, MD, Deborah Thorne, PhD, Elizabeth Warren, JD, Steffie Woolhandler, MD, MPH, et al., *Medical Bankruptcy in the United States, 2007*, 122 Am. J. Med. 741, 743 (2009), *available at* http://pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf.

Moreover, the value of assets available to sustain older people in their retirement has plummeted in recent years. Consumers are estimated to have lost about $2 trillion of their retirement assets, or 22 percent of their nominal value, in the recent economic recession. *See In Focus: Older Americans and the Recession*, AARP Pub. Pol. Inst. (July, 2009), http:// www.aarp.org/money/budgeting-saving/info-11-2008/Older_Americans_and_the_Recession.html. Nearly 30% of people facing foreclosure in 2007 were over age 50. *See* Allison Shelton, *A First Look at Older Americans and the Mortgage Crisis* 2, AARP Pub. Pol. Inst. (2009), *available at* http://assets.aarp.org/rgcenter/econ/i9_mortgage.pdf.

While older people increasingly are using credit, they tend to have low levels of financial literacy and are less familiar than are other age

groups with the vast array of complex financial products and services offered in an increasingly global and technology-driven economy. For example, older people are less knowledgeable about their credit scores than most other age groups. *See* U.S. Gov't Accountability Office, *CREDIT REPORTING LITERACY, Consumers Understood the Basics but Could Benefit from Targeted Educational Efforts*. 39, GAO 05-223 (March, 2005). Only 17 percent of older people, compared with 33 to 48 percent of those in all other age groups, had obtained their credit scores, and people over age 65 were less likely to say that they should check their credit reports from time to time for possible errors than all other age groups. *Id.*

Because older adults may have poor physical or emotional health and/or impaired mobility, they are highly susceptible to financial fraud and abuse. Some elders may not have the full capacity to make financial decisions due to the progression of dementias such as Alzheimer's disease. *See* The MetLife Study of Elder Financial Abuse, *Crimes of Occasion, Desperation, and Predation Against America's Elders*, .22 (June, 2011). Many older persons fear that they will lose their independence if anyone finds out that they may have reduced ability to manage their finances. As a result, even if they understand they have been a victim of a scam, they may not report it. *See* FBI, *Fraud Target: Senior Citizens*, http://www.fbi.gov/scams-safety/fraud/seniors. Financial insecurity and low levels of financial literacy make older people particularly

vulnerable to credit repair scams and other deceptive and misleading practices.

Older consumers suffer serious financial harm as a result of fraud and financial abuse, losing $2.9 billion every year. MetLife Study, at 2. The fraudulent tactics of credit repair services in particular continue to be a top concern for both consumers and enforcement agencies. For example, in 2008 the Federal Trade Commission (FTC) settled for $114 million an enforcement action arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679, with Compucredit and Jefferson Capital that raised claims and alleged facts similar to those in the instant case. *See FTC v. CompuCredit Corp. and Jefferson Capital Systems, LLC*, No. 1:08-CV-1976-BBM-RGV (N.D. Ga. 2008); *see also 2010 Consumer Complaint Survey Report*, Consumer Federation of America, National Association of Consumer Agency Administrators, and North American Consumer Protection Investigators, 1 (July 27, 2011). The harm older people suffer as a result of such fraud is particularly devastating, because they often have insufficient resources to provide for their basic necessities through their retirement. Some report that they fear running out of money more than they fear dying. *See* Carol Fleck, *Running Out of Money Worse Than Death, Older Americans' greater fear is outlasting their savings, poll reports*, AARP Bulletin, (July 1, 2010), *available at* http://www.aarp.org/work/retirement-planning/info-06-2010/running_out_of_money_worse_than death.html.

AARP is a non-partisan, non-profit organization representing the interests of people aged 50 and older. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets. A key to achieving this goal is helping individuals better manage financial decisions and protecting consumers from financial fraud and abuse that can erode retirement savings and financial assets. Additionally, AARP seeks to ensure that appropriate and adequate redress is available to consumers injured by misleading and deceptive practices.

The National Senior Citizens Law Center (NSCLC) is a non-profit organization whose principal mission is to protect the rights of low income older adults. For more than 35 years, NSCLC has sought to ensure the health and economic security of older persons with limited income and resources, through advocacy, litigation, and the education and counseling of local advocates. NSCLC's *Federal Rights Project* works to ensure that people retain the right to enforce basic guarantees to health care, economic security and civil rights.

SUMMARY OF ARGUMENT

A bad credit report jeopardizes access to credit as well as the availability of employment, insurance, and rental housing. Unscrupulous credit repair organizations preyed on consumers with bad credit, promising a quick fix for a high cash price. They falsely advertised that adverse information in credit

reports could be deleted, regardless of the accuracy of the negative information.

Passage of the Credit Repair Organizations Act (CROA), Pub. L. No. 104-208, 110 Stat. 3009-455 (1996) (codified at 15 U.S.C. 1679-1679i) was prompted by Congressional outrage at credit repair organizations bilking millions of dollars from financially stressed consumers, who were inexperienced in using credit, with false promises to remove negative credit histories. Congress sought to protect consumers from such misleading promises by arming them with accurate information regarding their credit reporting rights and their rights under the CROA.

The Petitioners in this case, as well as the dissent below, argue that consumers do not have a "right to sue," even though the CROA unquestionably mandates that credit repair organizations give consumers a notice informing them that they have a "right to sue" those who violate the law. 15 U.S.C. § 1679c(a). The argument that Congress required credit repair organization to provide an inaccurate notice to consumers is baseless and contrary to well established canons of statutory construction. The statutory purpose of protecting consumers from inaccurate information is served only if the CROA is interpreted as granting a right to sue.

This Court has long recognized that notice and hearing rights are interconnected such that the right to sue has little value and cannot be enjoyed

without notice of this right. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Baldwin v. Hale*, 68 U.S. 223, 233 (1863). The Court also has emphasized the importance of the accuracy of notice, requiring the "best possible" notice to "describe the plaintiffs' rights." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). A mandated notice of consumers' rights thus denotes that such rights exist.

Basic principles of statutory construction require rejecting an interpretation of the statute that produces the absurd result of mandating a "disclosure" notice that lies. Such an interpretation would effectively emasculate the requirement to accurately inform consumers of their rights, including their right to sue. Congress clearly did not intend such an "unreasonable result." *Brown v. Plata*, 131 S. Ct. 1910, 1931 (2011).

Moreover, the legislative history shows that the inclusion of the "right to sue" in the disclosure section was intended to "strengthen" the protection of consumers under the act. *Credit Repair Organizations Act: Hearing on H.R. 458 Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance and Urban Affairs*, 100th Cong. 2nd Sess., at 171, 173 (1988). The legislative history further indicates that Congress believed that the disclosures to consumers listed actual rights. S. REP. NO 103-209, at 7 (1993). Finally, the larger context of the Consumer Credit Protection Act, of which the CROA is a part, demonstrates the importance to Congress of accurate

disclosures to consumers. In this context, it is clear that Congress intended to impart to consumers a right to sue.

ARGUMENT

I. Congress Sought To Protect Unsophisticated Consumers By Providing Meaningful, Accurate Information-Based Disclosures Designed To Help Them Manage Their Credit

Congress enacted the Credit Repair Organizations Act, (CROA), Pub. L. No. 104-208, 110 Stat. 3009-455 (1996) (codified at 15 U.S.C. 1679-1679i), in the context of a series of consumer protection efforts that were also designed to strengthen the economic markets. Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r. These efforts focused in part on providing meaningful, accurate information-based disclosures to consumers to ensure that they have the information they need to understand and manage credit.

The use of information-based disclosures to protect consumers is appealing to both policymakers and economists for several reasons:

> First, information-based regulation is compatible with market forces, requiring product information to be made available in a standardized fashion without dictating how the product should be priced. Second,

> disclosure-focused regulation can provide consumers information that may otherwise be missing or unclear based on product advertisement, helping them avoid unsound credit decisions. Third, disclosure regulation is unlikely to interfere with product innovation, as it does not regulate any specific product attributes. Fourth, information-based protections are easily layered on top of existing regulatory regimes, such as state interest-rate or fee caps, because they do not generally create compliance conflicts. Finally, policymakers perceive information-based protections as less costly than direct regulation.

Mark Furletti, *Federal Consumer Protection Regulation: Disclosures and Beyond*, 5, Fed. Res. Bank Of Phil. (June 10, 2005). To achieve the interrelated goals of protecting consumers and fostering strong financial markets, such disclosures must be accurate and meaningful to the unsophisticated consumers who are the intended recipients. Otherwise they are not effective and fail to protect either the consumer or the markets as intended.

In passing the CROA, Congress sought to provide financially stressed, unsophisticated consumers of credit with the information they need to better understand their credit reporting and CROA rights so they could avoid financially harmful

deceptive and misleading practices. Congress also explicitly provided consumers a disclosure informing them, *inter alia*, they have a "right to sue" those who violate the law. 15 U.S.C. § 1679(a).

This Court should hold that the disclosures Congress mandated are meaningful and accurate: they inform consumers of a right to sue for violations of the CROA.

A. Deceptive And Misleading Practices by Credit Repair Organizations Bilk Million Of Dollars From Consumers Who Are Inexperienced With Credit and Uninformed Of Their Rights

The importance of credit to the American economy is hard to exaggerate.[2] With the enactment in 1968 of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601–1667f, Congress recognized that "[c]onsumer credit has become an essential feature of the American way of life." H.R. REP. NO. 90-1040, at 3 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1965. Congress found that the proper functioning of the

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[2] Levels of outstanding consumer credit demonstrate this importance. As of January, 1968, consumers had borrowed $1.4 billion. Fed. Res. Stat. Rel., *Consumer Credit Historical Data*, http://www.federalreserve.gov/releases/g19/hist/cc_hist_r.txt. By June, 2011, outstanding consumer credit rose to $2.47 trillion, down from its historical high of $2.56 trillion in 2008. Fed. Res. Stat. Rel., G. 19, *Consumer Credit Outstanding* (Aug. 5, 2011), http://www.federalreserve.gov/releases/g19/Current/.

banking system depends on well informed consumers, and well informed consumers need "meaningful disclosures." 15 U.S.C. § 1601(a). Specifically, Congress declared:

> economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers.

Id.

Increased demand for consumer credit led to increased reliance by lenders and others upon credit reports supplied by Credit Reporting Agencies (CRAs).[3] Credit reports detailing personal credit histories and the credit scores[4] derived from these

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[3] CRAs are private sector companies that receive information from businesses that offer credit and from other sources and compile this information into credit reports that are sold for a fee to consumers and other businesses. The U.S. credit reporting system is voluntary, as federal law does not require lenders and other creditors to report to CRAs. Creditors may report consumer information to one, all, or none of the CRAs, and information on individual consumers may differ among the three agencies.

[4] The most prominent credit score model is that of the Fair Isaac Corporation (FICO). FICO credit scores range from the best score of 850 to the lowest score of 300. The score is calculated by factoring in five categories of information: 35%

reports became a prerequisite to every application for credit.

> Because credit history scores can be used to measure credit risk, creditors use them, along with other measures of creditworthiness, such as collateral, income, and employment information, to determine whether to extend credit and, if so, on what terms. Credit history scores are closely aligned with the interest rates offered on loans—that is, higher scores are associated with lower interest rates.[5]

Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit* 304, Fed. Res. Bul. (Sum. 2004). *See* 15 U.S.C. § 1681(a)(2)–(3) (finding "An elaborate mechanism has

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payment history, 30% amounts owed, 15% length of credit history, 10% new credit, and 10% types of credit used. *See* FICO, *How Your FICO Credit Score is Calculated*, myfico.com, http://www.myfico.com/crediteducation/whatsinyourscore.aspx.

[5] An example provided by FICO demonstrates the harmful impact on a consumer of a lower compared to a higher credit score: "Take the example of borrowing $230,000 on a 30-year mortgage. A borrower with a FICO® Score of 760 could pay $221 less each month in interest as compared to a borrower with a FICO® Score of 630. That's a savings of $79,560 over the life of the loan. On a $20,000, 48-month auto loan, the borrower with a FICO® Score of 720 could pay $136 less each month in interest as compared to a borrower with a FICO® Score of 580. That's a savings of $6,528 over the life of the loan." FICO, scoreinfo.org, http://www.scoreinfo.org/FICO-Scores/How-FICO-Scores-Help.aspx.

been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers. Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.").

Credit quickly became "the lifeblood of the American consumer society." *See* 136 CONG. REC. H5325-02 (1990) (statement of Rep. Annunzio). Credit scores came to permeate every facet of a consumer's life, affecting not only lending decisions but also an individuals' ability to obtain employment, insurance, and rental housing. "A poor credit history" aptly has been described as "the 'Scarlet Letter' of 20th Century America. Consumers with bad credit histories can find it impossible to borrow to buy a car, purchase a home, or even . . . to rent an apartment." *Id.*

Due to lenders' reliance on credit reports to evaluate pricing of credit based on the risk of nonpayment, *see* Pub. L. No. 108-159 § 311, an inaccurate or unfavorable credit report is potentially devastating to consumers. In 1970, Congress enacted the Fair Credit Reporting Act (FCRA), Pub. L. No. 91-508, 84 Stat. 1136 (1970) (codified as amended at 15 U.S.C. 1681-1681t), "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). The FCRA sought to regulate consumer reporting agencies to ensure the accuracy of the information contained in a credit report and

provided consumers with the right to dispute and remove incorrect information about their credit history. The FCRA also provides that negative but accurate information cannot be removed from a credit report until the time specified has lapsed (generally, seven years after the event occurred, ten years for bankruptcy). 15 U.S.C. § 1681c.

Although designed to combat "unfair credit reporting methods," and to "ensure accuracy," *id.* at §1681(a)(1), the FCRA also enabled the emergence of opportunistic credit repair organizations (CROs) which took advantage of the FCRA dispute resolution procedures. CROs targeted consumers with poor credit, falsely claiming "through advertisements and oral representations . . . that adverse information in their consumer reports can be deleted or modified regardless of its accuracy." H.R. REP. NO. 103-486, at 63; 134 CONG. REC. H6707 (1988); *see also FTC v. Gill*, 265 F.3d 944, 951 (9th Cir. 2001) (describing advertisement claiming "there literally is nothing a consumer can possibly have on a credit report that we cannot remove and we can remove it legally.").

Being unaware that negative information cannot be removed from their credit histories, and in light of the damaging effect of a negative credit report, consumers were highly vulnerable to such advertisements. Legislation was "critically needed" to help protect consumers from CROs who "prey[ed] on consumers whose dreams of a better life and desperate situation [made] them susceptible to the false promises of unscrupulous credit repair

operators." 136 CONG. REC. H5325-02 (statement of Rep. Annunzio); *see* 134 CONG. REC. H6707 (statement of Rep. Annunzio).

CROs removed accurate and inaccurate information in a variety of ways. For example, they:

- Advised individuals to create new credit histories by obtaining new employee numbers from the IRS. *See* Press Release, *Credit Repair? Buyer Beware! FTC, States Announce Crackdown on Scams That Bilk Consumers*, 2, Fed. Trade Comm. (March 5, 1998).

- Negotiated with creditors by offering partial payment in return for the removal of negative credit information from their clients' credit reports. *Id.*

- "[I]nundat[ed] consumer reporting agencies with so many challenges to consumer reports that the reinvestigation system breaks down, and the adverse, but accurate, information is deleted."[6] H.R. REP. NO. 103-486, at 57.

"Credit repair organizations h[e]ld out the promise of a quick credit fix at a high cash price."

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[6] This tactic was enabled by the FCRA requirement that upon receipt of a dispute, a CRA has 30 days to "reinvestigate free of charge and record the current status of the disputed information, or delete the item from the file[.]" 15 U.S.C. § 1681i(a)(1)(A). CROs would inundate agencies with a high volume of disputes in order to overwhelm the CRA and prevent timely investigations, thereby forcing negative but accurate items to be deleted.

136 CONG. REC. H5325-02 (statement of Rep. Annunzio). Such tactics did not improve a consumer's credit report, however, because accurate information would reappear once the creditor certified that the disputed information was accurate. *See* 15 U.S.C. § 1681i(a)(5)(A). Already struggling consumers suffered significant financial harm because they paid high fees upfront, while CROs provided them no assistance. "Fraudulent companies that [led] consumers to believe that the companies can 'repair' bad credit histories [ ] bilked consumers of millions of dollars." S. REP. NO. 103-209, at 7 (1993); *See* 134 CONG. REC. H6707 (statement of Rep. Annunzio) (describing credit repair abuse in which 9000 people lost $2 million from CRO that charged customers up to $2000 in exchange for a promise to remove unfavorable credit information from the individual's files, but did nothing to clear the clients' credit histories or extend their available credit).

CROs often charged high fees disguised as payment plans to consumers already in dire financial straits for services that were never provided. Consumers faced difficulty when they tried to cancel or discontinue these services and get their money back. *See In re Nat'l Credit Mgmt. Group*, 21 F. Supp. 2d 424, 435 n.22 (D. N.J. 1998) (describing CRO use of a "phone check" to repeatedly debit client accounts).

The disruptive tactics of the CROs not only harmed consumers but also jeopardized the ability of CRAs to carry out their "grave responsibilities" of

providing fair, accurate credit information, 15 U.S.C. § 1681(a)(4), by "causing credit bureaus to waste time and money on spurious disputes." 140 CONG. REC. S5028 (1994) (statement of Sen. Reigle). In response to CRO tactics, credit bureaus began to refuse CRO dispute letters by categorizing them as frivolous or irrelevant, or by refusing to investigate on the grounds of consumer privacy, and consumers increasingly complained of significant inaccuracies in the credit reporting system. *See id.* (noting "As the industry has grown, the number of problems associated with consumer reports has also escalated. From 1990 to 1993, the Federal Trade Commission received more complaints regarding credit reporting than any other industry. Evidence presented before the Banking Committee indicates that all too many consumers have been denied credit, housing, and even employment due to errors in their credit reports.").

In response to consumer complaints about inaccuracies and other problems with CRAs, Congress amended the FCRA. Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, Div. A, Title II, Subtitle D; *see* 136 CONG. REC. H5325-02 (statement of Rep. Annunzio). Congress also addressed the deceptive practices used to prey upon financially stressed consumers who were inexperienced with their credit reporting rights by enacting the CROA.

B. The CROA Was Enacted To Provide Accurate Information To Protect Financially Stressed Consumers Who Are Inexperienced With Credit

Congress designed the CROA both to prohibit specific deceptive and misleading practices and to ensure that a financially stressed consumer has the information necessary to avoid being vulnerable to false and misleading representations about the ability to remove negative information from a credit report.[7] Congress expressed concern especially for those of limited economic means who are inexperienced in credit matters, finding they would be the most prone to having poor credit scores and at greatest risk for being taken advantage of.[8] 15 U.S.C. § 1679(a).

Congress required CROs to provide an explicit written disclosure to consumers entitled, "Consumer

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[7] *See* Respondent's Br. at 2 - 3 for a description of the specific requirements of the CROA.

[8] Studies conducted to evaluate consumer knowledge of credit reporting supports the validity of this concern. *See* U.S. Gov't Accountability Office, *CREDIT REPORTING LITERACY, Consumers Understood the Basics but Could Benefit from Targeted Educational Efforts*, 39. GAO 05-223 (March, 2005) (finding "most consumers did not fully understand their rights in the dispute process—for example, that there is no cost to dispute inaccurate information" and that "having less education, lower incomes, and less experience obtaining credit were associated with lower survey scores, while having certain types of credit experiences—such as an automobile loan or a mortgage—were associated with higher scores.").

Credit File Rights Under State and Federal Law." 15 U.S.C. § 1679c(a). This disclosure must be provided prior to the formation of an agreement in a document separate from the written contract for services. *Id.* It informs consumers of their rights under the FCRA to obtain their credit reports and to dispute erroneous information. *Id.* In addition, it prohibits any payment until services are fully performed, *id.* at § 1679b(b); requires a written contract for all services, *id.* at § 1679d; and informs consumers of the right to cancel the contract within three days. *Id.* at § 1679e. Finally, of particular relevance to this case, the mandated disclosure notice provides "[y]ou have the right to sue a credit repair organization that violates" the CROA. *Id.* at § 1679c(a). Failure of a CRO to provide the required disclosure is a violation of the CROA. *Id.*

The CROA-mandated disclosures were drafted by Congress to accurately inform consumers "inexperienced with credit" that negative information cannot be removed from a credit report, and of their rights under the CROA. 15 U.S.C. § 1679(a). They were designed to enable consumers to avoid bad actors who blatantly engage in deceptive practices, as well as those who cross the "fine line, in advertising and soliciting for credit counseling services to an unsophisticated audience of lower-income debtors, between promising future rewards for creditworthiness, and implying that existing bad credit records may be prematurely expunged." *Zimmerman v. Cambridge Credit Counseling Corp.*, 529 F. Supp. 2d 254, 275 (D. Mass. 2008), *aff'd sub nom Zimmerman v. Puccio*, 2010

U.S. App. LEXIS 15315 (1st Cir. Mass., July 27, 2010).

C. Congress Took Deliberate Steps To Ensure Consumers Would Receive Accurate Information

Importantly, Congress did not permit CROs any discretion in drafting the language of the disclosure notice "so as to avoid possible obfuscation" by the very entities whose misleading and deceptive practices they were seeking to address. *Credit Repair Organizations Act: Hearing on H.R. 458 Before the Subcomm. on Consumer Affairs and Coinage of the Comm. on Banking, Finance and Urban Affairs*, 100th Cong. 2nd Sess. (1988) (letter from Daniel Oliver, Fed. Trade Comm. Chairman); *see* 15 U.S.C. § 1679(c). Nor did Congress permit CROs any flexibility to alter the language of the required disclosure. *Id.*; c.*f. Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1341 (2010) (finding "flexibility to tailor the disclosures to its individual circumstances, as long as the resulting statements are 'substantially similar' to the statutory examples" only because such flexibility is permitted under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. § 101(12A)). Indeed, courts have found that CROs violate the CROA by changing a provision of the mandated disclosure notice. *See In re Nat'l Credit Mgmt. Group*, 21 F. Supp. 2d at 458 (finding "[t]he right to cancel set forth in the Disclosure Agreement does not comply with Section 1679e because it fails to include the specific requisite language and

because it does not comply with minimal time allotments for cancellation.").

In addition to making it a violation of the statute to fail to provide the required disclosure notice, Congress took steps to ensure the CROs would not be able to evade the requirements of the CROA by contract. Congress explicitly provided that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void." *Id.* § 1679f(a). Use of such "broad and emphatic language found in the legislative history shows that Congress understood what it was saying." *United States v. James*, 478 U.S. 597, 608 (1986) (finding "[i]t is difficult to imagine broader language" in construing statute providing '[n]o liability of *any* kind shall attach to or rest upon the United States for *any* damage ... at *any* place.'").

Thus, Congress took significant steps to ensure the disclosure notice consumers received accurately informed them of their rights. Congress "[said] in [the] statute what it means and means in [the] statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

II. The CROA Provides Consumers Not Only With The Right To A Disclosure Notice That Lists The Right To Sue But Also With The Right To Sue

Among the rights about which Congress sought to inform consumers by including it in the disclosure notice is the "right to sue a credit repair organization that violates" the CROA. 15 U.S.C. § 1679c(a). While the liability provision of the CROA, 15 U.S.C. § 1679g, creates the private right of action, *see* Respondent's Br. at 16-17, the disclosure provision strengthens that liability by informing consumers of their "right to sue."

The view of judges who have advocated that consumers do not have a right to sue under the CROA cannot be squared with the statute. *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1215 (9th Cir. 2010) (Tashima, J., dissenting); *Rex v. CSA-Credit Solutions of America, Inc.*, 507 F.Supp.2d 788, 799 (W.D. Mich. 2007). Under such reasoning, Congress intended to provide consumers with a "disclosure" notice that would deceive them, misinforming them that they have a right they do not actually possess.

This Court should reject an approach to statutory construction which posits congressional intent to require credit repair organizations to lie to consumers about their rights. Notice could not possibly serve its intended function of informing consumers of their rights if the rights listed on the notice do not exist. Interpreting the CROA as

providing an actual right to sue as opposed to merely a piece of paper with misinformation is consistent with (1) analogous precedent establishing that the right to a hearing is coextensive with the right to notice, (2) this Court's mandate to avoid an absurd result when interpreting statutes, (3) the CROA's purpose and legislative history and (4) interpretations of other statutes within the larger scheme of the Consumer Credit Protection Act, of which the CROA is a part, that require accurate disclosure notices.

A. Because Notice And Hearing Rights Are Interconnected, The Right To Notice Indicates That Consumers Have A Right To Sue

This Court has long recognized that the right to a hearing is intertwined with the right to notice. In *Baldwin v. Hale*, 68 U.S. 223 (1863), this Court stated:

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.

68 U.S. at 233. The right to a hearing cannot be "enjoyed" without notice of that right. As this Court explained, the "right to be heard has little reality or

worth unless one is informed" of this right. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice is an integral part of the right to a hearing. Reliance upon "the vagaries of 'word of mouth' referral" to inform people of the availability of a hearing is insufficient to provide an opportunity to be heard. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 n.14 (1978). As the Second Circuit reasoned, "in the absence of effective notice, the other due process rights afforded a benefits claimant - such as the right to a timely hearing - are rendered fundamentally hollow." *Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005). Thus, the right to a hearing is actualized by the right to a notice of that hearing.

"For more than a century, the central meaning of procedural due process" has been that notice is required to fulfill the right to a hearing. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The "requirement of notice and an opportunity to be heard," in combination, "guarantees" a fair decision making process and protects "against arbitrary deprivation of property." *Id.* at 81. The Court's "procedural due process cases have consistently observed" that notice and an opportunity for a hearing "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005). This Court's jurisprudence has viewed the right to a hearing as dependent upon the notice right.

The purpose of notice is not simply to supply a piece of paper, but rather to inform individuals of rights they possess. "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div.*, 436 U.S. at 14-15. As this Court recently stated, Due Process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010) (citing *Mullane*, 339 U.S. at 314). Notice serves an important function of enabling individuals to prepare for a hearing. The right to notice is not an empty right to information about a hearing that is unavailable or rights that do not exist.

Additionally, this Court has stressed the importance of the accuracy of notice of hearing rights. Far from accepting misleading or deceptive notices, this Court has held that Due Process requires "timely and accurate notice," including a detailed explanation. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Such notice must be provided "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *accord Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). The notice "must be the best practicable," and it is the role of notice to "describe...the plaintiffs' rights." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The requirement to provide the best practicable notice cannot be fulfilled by supplying

inaccurate information, but rather, must truthfully list those rights.

Thus, the CROA's requirement to provide notice of rights clearly indicates that those rights exist. A useful analogy is the right to opt out of a class action supplied by the notice provision in the federal rules. Fed. R. Civ. P. 23(c)(2)(B) requires notice to members of (b)(3) class actions informing members that "the court will exclude from the class any member who requests exclusion." There is no other provision in the rules separately stating that class members have a right to be excluded from the class. The right to opt out is created entirely by the notice provision. Relying solely on the notice provision, this Court recently stated that in (b)(3) actions, "class members are entitled to receive the 'best notice that is practicable under the circumstances' *and to withdraw from the class.*" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (citing Fed. R. Civ. P. 23(c)(2)(B) (emphasis added). Thus, the notice requirement in the rules not only discloses the right to opt out of the class, but also provides the right to do so. The CROA mandate to provide a notice of a right to sue similarly reflects actual rights the consumer has.

While the instant case involves statutorily required notice instead of constitutionally mandated notice or a notice requirement of the federal rules, this Court's exposition of the interconnection between hearing and notice rights is controlling precedent. The right to notice is necessary to truly provide a right to sue. Therefore, the requirement to

disclose the right to sue clearly strengthens—and cannot possibly destroy—the entitlement to sue.

B. An Interpretation Of The CROA That It Requires A "Disclosure" To Misinform A Consumer About Statutory Rights Produces An Absurd Result That Is Contrary To This Court's Approach To Statutory Construction

The reasoning of the Ninth Circuit dissent—that the statutory requirement to provide a "disclosure" of the right to sue does not impart a right to sue—would produce a nonsensical interpretation of statutory law. The Ninth Circuit majority aptly called this "playing Humpty Dumpty with the statute." *Greenwood*, 615 F.3d at 1209.

This Court has cautioned repeatedly against an illogical approach to statutory interpretation, stating, "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). This past term, this Court likewise concluded that "Congress did not require [an] unreasonable result." *Brown v. Plata*, 131 S. Ct. 1910, 1931 (2011). Thus, there is no basis for interpreting the CROA to produce the absurd result of requiring a "disclosure" notice that deceives consumers. *Cf. Milavetz*, 130 S. Ct. at 1324 (2010) (rejecting expansive reading of bankruptcy statute that would produce absurd result).

Interpretation of 15 U.S.C. § 1679c(a) as requiring a notice of a right to sue but no actual right to sue would effectively emasculate the provision. This Court has consistently refused to approach statutory construction in a manner that renders statutory provisions a "dead letter." *Ricci v. DeStefano*, 129 U.S. 2658, 2674 (2009); *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 514 (1990). A law should not be interpreted "to destroy itself;" on the contrary, statutory provisions should be interpreted to serve their "manifest purpose." *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). This is "an elementary rule of [statutory] construction." *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995). "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

This Court's precedents informed Congress that the right to a hearing is intertwined with the right to notice of that hearing. Congress is presumed to be "aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 130 S.Ct. 1784, 1795 (2010); *accord North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995). In passing the CROA in 1996, Congress understood that a right to sue articulated within a required disclosure notice comported entirely with the Court's repeated exhortations that the mechanism for actualizing a right to a hearing is the provision of notice. An

interpretation of the statute to eviscerate the right to sue based on its inclusion in the list of required disclosures is simply absurd.

C. The Purpose And Legislative History Of CROA Establish That Congress Intended To Confer A Right To Sue, Not A Right To A Piece Of Paper With Misinformation

An interpretation of the CROA that it confers only a right to inaccurate information and not a right to sue is contrary to both the purpose and the legislative history of the statute. The CROA states that its purpose is: "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations," as well as "to ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services." 15 U.S.C. § 1679(b). Clearly, the public cannot be protected from deception and make informed decisions if credit repair organizations supply an *inaccurate* statement that individuals have a right to sue. The CROA's objectives of preventing deception and ensuring the provision of all information needed to make informed decisions plainly demonstrate that Congress did not intend the notice of a right to sue to deceive consumers.

The legislative history provides further support that Congress intended to create a right to

sue, not to confer a right to a misleading piece of paper. While the CROA was enacted by Congress in 1996, hearings on the bill began in 1988. *See Credit Repair Organizations Act: Hearing on H.R. 458.* Representative Frank Annunzio opened the hearing by stating, "[C]redit repair clinics pose a threat to consumers who can least afford it...They prey on consumers." *Id.* at 1-2. Thus, the drafters of the CROA were seeking to protect consumers, not to mislead them.

As initially drafted, the right to sue was not required to be disclosed, but was listed in separate sections regarding liability and jurisdiction. *Id.* at 153. In a hearing on the 1988 draft, the bill was criticized for failing to require a disclosure of the right to sue. Daniel Oliver, the Chairman of the FTC, sent a letter to the committee recommending that "the proposed legislation . . . be strengthened." *Id.* at 171, 173. He urged that "to be most effective, any required disclosures be conveyed. . . in simple, non-technical language." *Id.* at 175. Oliver suggested that the rights disclosed to the consumer include the following: "You have the right to sue a credit repair or credit improvement company that violates the Credit Repair Organizations Act." *Id.* This legislative history demonstrates that the requirement to disclose the right to sue was intended to bolster—not detract from—the right to sue by ensuring consumers understand they have this important right.

The CROA was re-introduced as part of the Consumer Reporting Reform Act of 1994, which

would have amended the Fair Credit Reporting Act. In both the House and Senate versions of the bill, the right to sue was located in the disclosure section of the bill. H.R. 1015, 103rd Cong. § 201 (1994); S. 783, 103rd Cong. § 201 (1994). This reflects the influence of the FTC's recommendation that the bill be strengthened by incorporating the "right to sue" in the disclosure section. The Senate report includes the following explanation of the disclosure section: "the Committee bill requires credit repair organizations to provide disclosures to consumers that indicate the consumers' rights under the FCRA and under Title II of the Committee bill before signing any contract." S. REP. NO 103-209, at 7 (1993). Thus, this statement in the legislative history clearly demonstrates congressional intent to disclose to consumers rights they actually have under the CROA and that Congress understood that the disclosures to consumers listed actual rights.

The 1994 House and Senate versions of the bill both contained the identical disclosure requirement of the right to sue, but differed in other ways. H.R. 1015, 103rd Cong. § 201 (1994); S. 783, 103rd Cong. § 201 (1994). These versions were not reconciled, and so the 1994 bill was not enacted. *See id.* But the bill which became law in 1996 contained the same disclosure requirements as those in the 1994 bill. *See* Omnibus Consolidated Appropriations Act, 1997. There was no further discussion of the disclosure requirement of the right to sue in the legislative history of the 1996 legislation. *See* H.R. REP. NO. 104-863, at 466-70 (1996) (Conf. Rep.) (reintroducing the same language of the disclosure

provision as the proposed 1994 legislation). Thus, the legislative history from the 1994 bill provides the explanation of congressional intent, showing that Congress mandated disclosure of the "right to sue" in order to strengthen that right.

In sum, the contention that the requirement to disclose the right to sue was intended to mislead consumers cannot be squared with the purpose of the CROA, which seeks to protect consumers from misinformation. In addition, the legislative history demonstrates that Congress believed that it had in fact created a right to sue, not a right to a deceptive notice. The 1993 Senate Report demonstrates that the placement of the right to sue in the notice section was intended to fortify—not eliminate—the right to sue.

D. The CROA Must Be Interpreted As Part Of A Larger Scheme Of Consumer Protection Statutes That Protect Consumers By Requiring Accurate Disclosure Notices

Interpretation of the CROA should be guided not only by the clear statutory language, as discussed, but also by Congress's deep concern with protecting consumers who were vulnerable to deceptive and misleading practices because they did not have important information they needed to protect themselves. The Court ascribes to the statutory language its plain meaning, but "the meaning of statutory language, plain or not, depends on context." *Holloway v. U.S.*, 526 U.S. 1, 7 (1999)

(quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). "It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

The disclosure provisions of the CROA, including the right to notice of the right to sue, were enacted to serve Congress's deep concern with protecting consumers who were vulnerable to deceptive and misleading practices because they did not have important information they needed to protect themselves from unscrupulous credit repair organizations. This overarching purpose could not be served, and indeed would be thoroughly undermined, if the notice Congress drafted is interpreted in such a way that it provides inaccurate and misleading information regarding consumers' rights under the statute.

As noted, the CROA is not a standalone statute, but rather is contained within the Consumer Credit Protection Act (CCPA), 15 U.S.C. §§ 1601-1693r. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1615 (2010) ("several statutes [are] collectively known as the Consumer Credit Protection Act"); *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 706 (9th Cir. 2010) (noting that the CROA is within the "larger statutory scheme" of the Consumer Credit Protection Act). The component parts of the Consumer Credit

Protection Act are the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667f; the Fair Credit Billing Act (FCBA), 15 U.S.C. §§ 1666-1666j; the Consumer Leasing Act (CLA), 15 U.S.C. §§ 1667-1667f; the Federal Wage Garnishment Act, 15 U.S.C. §§ 1671-1677; the Credit Repair Organization Act (CROA), 15 U.S.C. §§ 1679-1679j; the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x; the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f; the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p; and the Electronic Funds Transfer Act (EFTA), 15 U.S.C. §§ 1693-1693r. Because all the component statutes of the Consumer Credit Protection Act share the "common purpose" of seeking "to protect consumers with respect to financial credit," courts of appeals have "draw[n] upon case law interpreting one statute for persuasive authority for another statute." *Clemmer v. Key Bank Nat. Ass'n*, 539 F.3d 349, 353 (6th Cir. 2008).

The purposes of the other laws within the Consumer Credit Protection Act with regard to accurate disclosure notices were known to Congress when it drafted the CROA because it was the last statute enacted as part of the Consumer Credit Protection Act. *See* Omnibus Consolidated Appropriations Act, 1997; *see e.g.* Pub. L. No. 91-508, 84 Stat. 1128 (1970) (enacting the Fair Credit Reporting Act). Therefore, the objectives of the other parts of the Consumer Credit Protection Act are relevant to the determination of congressional intent in drafting the CROA.

When viewing the component statutes within the Consumer Credit Protection Act, this Court has held that they seek to ensure accurate disclosure. For instance, this Court explained that "Congress enacted TILA in 1968, as part of the Consumer Credit Protection Act, to 'assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.'" *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 53-54 (2004) (citing 15 U.S.C. § 1601(a)). Similarly, this Court found that Congress enacted the FDCPA to "eliminate abusive debt collection practices." *Jerman*, 130 S.Ct. at 1608 (citing 15 U.S.C. § 1692(e)). The FDCPA forbids debt collectors "from making false representations as to a debt's character, amount, or legal status." *Id.*; 15 U.S.C. § 1692e. Those who fail to comply with statutory requirements "are liable to such person[s]." 15 U.S.C. § 1692k(a). In addition, this Court found that Congress intended that the FCRA would "assure the maximum possible accuracy" from credit reporting agencies. *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) (citing 15 U.S.C. §1681e(b)).

Several courts of appeals likewise have reviewed the purpose of other component statutes within the Consumer Credit Protection Act and concluded that those laws are designed to promote accurate disclosure and/or notice. The CLA was enacted to promote "a meaningful disclosure of the terms of leases." *Miller v. Nissan Motor Acceptance Corp.*, 362 F.3d 209, 216 (quoting 15 U.S.C. 1601(b)). The EFTA shares the "common purpose of each

statute [of the CCPA] to protect consumers." *Clemmer*, 539 F.3d at 353. The statute requires that regulations be drafted to force automated teller machine operators to "provide notice" regarding a charged fee to consumers. 15 U.S.C. § 1693b(d)(3)(A). The accuracy of notice provided is significant, as it is "undisputed that a consumer must receive some definite message" before being charged a fee. *Id.*, 539 F.3d at 355. The text of the FCBA likewise "indicates that Congress intended for the card issuer to protect the cardholder from fraud." *DBI Architects, P.C. v. American Express Travel-Related Servs. Co., Inc.*, 388 F.3d 886, 891-92 (D.C. Cir. 2004).

Thus, findings that analogous components of the Consumer Credit Protection Act must be interpreted as requiring accurate disclosures and protecting consumers further supports an understanding that the CROA disclosure provision could not possibly have been intended by Congress to establish a requirement to provide misleading notice. In light of the objectives of the Consumer Credit Protection Act, it is clear that the CROA's disclosure requirement actualizes the right to sue through the required disclosure notice.

CONCLUSION

Amici AARP and NSCLC respectfully urge this Court to find that the disclosure Congress drafted in the CROA to inform consumers that they have a "right to sue" is meaningful and accurate in that consumers indeed have a right to sue.

Respectfully submitted,

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August 15, 2011

AMICUS CURIAE BRIEF

No. 10-948

IN THE

Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,

Petitioners,

v.

WANDA GREENWOOD *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ") is a voluntary national bar association whose members primarily represent individual plaintiffs in civil actions. AAJ is committed to the First Amendment value of providing access to courts for the redress of grievances and the Seventh Amendment value of dispute resolution through trials by juries. AAJ appears here to address the critical differences between a right to sue and an opportunity to arbitrate.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress chose the words defining the rights of consumers under the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.* Congress gave consumers a "right to sue."

To sue is not to arbitrate. It is not so in vernacular and it is not so in specialized usage. A suit is a matter of right, protected by the First Amendment. Arbitration is a matter of consent, a conscious waiver of the right to sue. Congress, in CROA, precluded consumers from making that waiver.

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[1] Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court. Pursuant to Rule 37.6, *amicus* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or counsel make a monetary contribution to its preparation.

This court has described arbitration as an alternative to suit and has acknowledged vast differences between procedures used in judicial and arbitral forums. It has opined that people choose the arbitral forum for privacy, reduced formality, greater speed, and substantive commercial expertise that the arbitrator might possess. It has acknowledged that procedures available by right in court are incompatible with arbitration and can lead to differences in outcome between cases adjudicated in court or heard in arbitration. Those differences are critical here, where Congress specifically has envisioned class action suits in courts and this Court has found that arbitration is "poorly suited to the higher stakes of class litigation." *AT&T Mobility v. Concepcion LLC*, 131 S. Ct. 1740, 1752 (2011).

By granting a right to sue, specifically granting a right to bring class actions, and precluding waiver of those rights, Congress precluded enforcement of pre-dispute agreements to arbitrate CROA claims. Whatever benefits some persons might perceive in arbitration, Congress perceived that for cases under the Act, which involve abuse of consumers, the judicial forum, administered by public servants and citizen-jurors, with class actions available, and with adjudications subject to public scrutiny and reflection, is the right forum. Class actions and transparent public adjudications advance the Congressional purpose of protecting "the public from unfair or deceptive advertising and business practices by credit repair organizations," CROA, 15 U.S.C. § 1679(b)(2), in a way that opaque, private, individual adjudications do not.

The unambiguous text of the Act requires the result reached by the Ninth Circuit below.

ARGUMENT

The unambiguous text of CROA requires "disclosures" to consumers, among them that a consumer has "a right to sue a credit repair organization that violates the Credit Repair Organization Act." 15 U.S.C. § 1679c(a). Petitioner refers to this right as "ostensible" and suggests that it is merely "procedural" and subject to waiver. Pet'r's. Br. 13. The text of the Act does not permit that interpretation. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) ("the text of the statute controls our decision.")

The words "right to sue" were chosen by Congress. Whether there is a right is unquestionable; Congress said there is. And Congress required that the right be disclosed. There would be no purpose in disclosing an "ostensible" right.

Whether the right is procedural or substantive is of no matter. Congress unambiguously precluded, without limitation to whether a right were procedural or substantive, "Any waiver by any consumer of any protection provided by or any right of the consumer under" CROA. 15 U.S.C. § 1679f(a). Congress effectively found that consumers would not be able to "vindicate [their] statutory cause of action in the arbitral forum," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) and required a judicial forum for CROA claims.

The question remaining is whether the "right to sue" includes a right to arbitrate. If it includes

only the right to initiate an action in a judicial forum, the Act's ban on waivers of rights bars enforcement of a pre-dispute agreement to arbitrate a CROA claim. The text of the Act requires a finding that the right to sue is what ordinary usage suggests: the right to go to court.

CROA grants rights to bring "individual actions" and "class actions." 15 U.S.C. § 1679g(a)(2)(A), (B). In *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006), this Court noted that "statutory terms are generally interpreted in accordance with their ordinary meaning" and explicated the ordinary meaning of having a "right of action." It cited two editions of Black's Law Dictionary. The 1951 edition called a right of action "'[t]he right to bring suit; a legal right to maintain an action,' with 'suit' meaning 'any proceeding . . . *in a court of justice*.'" (emphasis added). The 2004 edition "defines 'action' as '[a] civil or criminal *judicial proceeding*.'" *Id.* at n.3 (emphasis added). The Court further noted that the term "damages," which are authorized for the rights of action granted in Section 409 of the CROA, "is generally used to mean 'pecuniary compensation or indemnity, which may be recovered *in the courts*.'" *Id.* at 91-92 (quoting Black's Law Dictionary; emphasis added by the Court). Having a right of action means having the right to ask a court to resolve a grievance. CROA precludes the waiver, inherent in a pre-dispute arbitration agreement, of that right. 15 U.S.C. § 1679f(a).

This interpretation is consistent with the Congressional purpose to protect the "vital interest" of consumers in protecting their credit data. 15 U.S.C. § 1679(a)(1). Adjudication in public courts

serves that purpose better than alternative dispute resolution by private tribunals.

Congressional insistence on a public forum is merely a default setting. The right to go to court is constitutionally protected, a matter of public right and state compulsion, protected by the First Amendment. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.").[2] Arbitration, by contrast, results only from private agreement. *See, e.g., Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776, (2010) (it is a "fundamental principle that arbitration is a matter of contract"). Congress affects no fundamental constitutional right by precluding, in CROA, assent to arbitration. Indeed, the non-waiver provision of CROA does not even conflict with the FAA, as it acts to preclude the formation of an arbitration agreement. The FAA does not compel arbitration; it compels only a remedy, specific enforcement of consensual arbitration agreements. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 593 (2008) (providing for specific enforcement was the "main goal" of Congress in enacting the FAA).

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[2] The Framers emphasized that access to courts, not just the legislative branch, came within the petition clause, replacing draft text of the First Amendment granting a right to apply to the "legislature" for redress of grievances with a right to apply to the newly created, tri-partite "government." Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 Hastings Const. L.Q. 15, 39-40 (1993). Providing facilities for litigation is "one of the first duties of government." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

"Arbitration" is not defined in the Federal Arbitration Act. The American Arbitration Association defines it as "a time-tested, cost-effective alternative to litigation. Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision, known as an 'award.'" American Arbitration Association, http://www.adr.org/arb_med (last visited Aug. 11, 2011). Litigation is very different. It has been described as:

> a social process that uses the power of the state to require the reluctant to talk and to listen, not just to each other, but also to judge (and sometimes juries) who must in turn listen and talk to the parties. These public officials are the trustees of the community. They are given the power to decide who is right and who is wrong and, if need be, to bring the conduct of the parties into conformity with the norms of the community. The underlying hope is that if all goes well, justice will be done.

Owen M. Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1672-73 (1985). Arbitration does not seek "justice" and it does not depend on compulsory state power. It seeks, primarily, quick resolutions of commercial disputes through "moral suasion." Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Act*, 12 Va. L. Rev. 265, 266 (1926).[3] And arbitrators are

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[3] Cohen and Drayton, oft-cited by this Court, were primary drafters of the Federal Arbitration Act. *See Brown v. Genesis Healthcare Corp.*, --- S.E.2d ----, 2011 WL 2611327 (W. Va. June 29, 2011), text accompanying n.55.

not trustees of the community. Their duty is to follow the terms of the agreement by which they have been given power. This Court has criticized an arbitral panel for proceeding "as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1769 (2010), highlighting a critical difference between the two forums.

This court has catalogued the reasons persons choose arbitration over litigation—speed, informality, lower cost, the ability to choose expert adjudicators—and the things given up to gain those advantages—procedural rigor and judicial appellate review. *See, e.g., Stolt-Nielsen*, at 1775. *See also Republic Steel Corp. v. Maddox*, 379 U.S. 650, 664 (1965) (Black, J., dissenting) ("Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.")

JAMS, one of the nation's leading private dispute resolution services, similarly describes the differences between arbitration and litigation:

> By agreeing to arbitration, the parties, perhaps among other things, are waiving their fundamental, constitutional right to a trial by a jury of their peers. They can have no *de novo* (second trial) after they have gone to

> arbitration. Unless otherwise agreed, the decision is *legally binding* and *non-appealable*, except in extremely limited circumstances, such as in the case of fraud or collusion on the part of the arbitrator.

JAMS Arbitration, Mediation, and ADR Services, *Arbitration Defined*, http://www.jamsadr.com/arbitration-defined (last visited Aug. 11, 2011) (emphases in original). JAMS emphasizes speed, asserting that "most matters" that it arbitrates "are resolved within six months of the appointment of the arbitrator." http://www.jamsadr.com/adr-arbitration/.

Professor Richard C. Reuben, a leading scholar of alternative dispute resolution,[4] describes differences between the two forums in similar fashion, and also describes consequences of the differences:

> If public adjudication in the United States provides a baseline against which the democratic character of other dispute resolution processes may be measured, arbitration under the Federal Arbitration Act tends to fall short of the mark in many important respects. . . .

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[4] Professor Reuben is James Lewis Parks Professor of Law at the University of Missouri School of Law, was Reporter for the Uniform Mediation Act, and has published widely on alternative dispute resolution and democratic values. *See*, http://law.missouri.edu/faculty/directory/reubenr.html

> . . . [A]rbitration provides little in terms of accountability. Arbitration awards are generally not subject to the kind of substantive review that is available for decisions in public adjudication. . . .
>
> Similarly, transparency and rationality are not essential values of arbitration. . . . [A]rbitrators are not required to make their decisions according to rules of law . . .
>
> Because of the enormous decisional discretion vested in arbitrators, arbitration does not, and arguably should not, provide any assurance of equal treatment of the parties, at least in the sense of the application of substantive rules. To the contrary, arbitration provides a highly individualized form of justice that is narrowly tailored to the specific circumstances presented to the arbitrator, who makes a decision according to whatever substantive standard he or she determines is appropriate under the circumstances, unless the submission to arbitration specifies otherwise. . . .

Richard C. Reuben, *The Democratic Legitimacy of Government Related Dispute Resolution*, 12(2) Disp. Resol. Mag. 23, 24 (Winter 2006).

These differences, particularly limited review in public courts, cause many business litigators and

corporate general counsel to avoid pre-dispute arbitration agreements. A survey of "400 business litigators in Southern California" suggested that 87 percent of the respondents preferred litigation over arbitration—and that by far the dominant reason for this preference was "the availability of appellate review." Rebecca Callahan, *Arbitration v. Litigation: The Right to Appeal and Other Misperceptions Fueling the Preference for a Judicial Forum*, 3 n.7, 35 (2006), *available at* http://law.bepress.com/expresso/eps/1248; *see also* David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations*, 26-28 (1998), http://digitalcommons.ilr.cornell.edu/icrpubs/4/ (in survey of general counsel or chief litigators for Fortune 1000 corporations, "54% said they didn't use [arbitration] because arbitrators' decisions were difficult to appeal.").

In the case of CROA, Congress did not express concern for the primary advantages—speed, finality, and alternative substantive standards for resolution—that arbitration can bring. It focused on the public values inherent in courts. Congress decided that unlike most matters, where "it is more important that the applicable rule of law be settled than that it be settled right," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), under CROA it is more important that the law be decided correctly than that it be decided quickly and finally. Congress entrusted the development of the law to trustees of the public and Congress precluded consumers from placing it elsewhere.

Petitioner cites seven bullet-pointed examples of Congressional enactments in which Congress banned arbitration clauses by using ostensibly more clear language than the unambiguous language it did use in CROA. In two recent enactments that account for five of the seven cited examples, Congress, as it did in CROA, recognized rights to bring actions in court and established that arbitration agreements can constitute waivers of those rights.

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act provides four of the seven bullet-pointed examples Petitioner cites. It provides, immediately preceding text cited by Petitioner:

> (1) Waiver of rights and remedies.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, *including by a predispute arbitration agreement.*

18 U.S.C. § 1514A(e)(1) (emphasis added). At subsection (b), the statute provides the right to bring a civil suit after filing a complaint with the Department of Labor that is not resolved within 180 days.

Similarly, the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(d)(1), again immediately preceding text cited by Petitioner, provides, with an exception for certain disputes arising under collective bargaining agreements:

> (1) Waiver of rights and remedies. Except [for certain disputes arising

> under collective bargaining agreements], the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, *including by any predispute arbitration agreement.*

(emphasis added). At section (c) the statute grants the right to bring civil suit after exhaustion of administrative remedies.

Both of these statutes, like CROA, authorize suit and include the right to bring suit in court as among rights and remedies that cannot be waived. The absence of specific text in CROA referring to arbitration agreements does not negate the fact that the text of the statute unambiguously bars waiver of the right to bring suit in court. The presence of specific text in the newer statutes is better explained by Congressional awareness of and sensitivity to the twenty cases this Court has decided since the enactment of CROA in 1996 explicating the meaning of the FAA[5] and making clear that the statue very

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[5] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 130 S. Ct. 1758 (2010); *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Vaden v. Discover Bank*, 556 U.S. 49 (2009); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 1035 (2007); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Mowsam v. Dean Witter Reynolds*, Inc., 537 U.S. 79 (2002); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v.*

broadly requires enforceability of arbitration agreements. *See Porter v. Nussle*, 534 U.S. 516, 528 (2002) (The Court presumes that Congress is aware of the Court's precedents when it acts).

This Court's recent decisions in *Stolt-Nielsen* and *Concepcion* make clear that procedural features of arbitration render prospects of liability different in arbitration and in litigation, particularly for the class actions specifically authorized by CROA: the forum affects outcomes. CROA not only authorizes class action litigation, it creates a special rule for punitive damages in class actions, permitting aggregate damages for the class "without regard to any minimum individual recovery." 15 U.S.C. § 1679g(a)(2)(B)(ii). Congress clearly was very sensitive to the availability of class actions and to the particular remedies available in courts to certified classes.

In *Stolt-Nielsen* this court observed, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 130 S. Ct. at 1775. In litigation, of course, whether a class action occurs depends on rules, not consent of the defendant. This Court's holding in *Concepcion* is premised on that point. California's rule banning class arbitration was condemned because it was a matter of law and not a

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Adams, 532 U.S. 105 (2001); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000); *Wright v. Universal Maritime Svc. Corp.*, 525 U.S. 70 (1998).

matter of consent: "[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." *Concepcion*, 131 S. Ct. 1740, 1751 (2011).

The late Richard Nagareda, whose writings this Court found persuasive in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), discussed the then-pending *Concepcion* case and noted, "The central argument against class waivers is that they purport to do something that public legislation may do but that private contracts may not—namely, operate as exculpatory clauses by repealing, in practical effect, a private right of action contained in existing law." Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 Notre Dame L. Rev. ____ (forthcoming April 2011), *available at* http://ssrn.com/abstract_id=1670722. While rejecting this argument as applicable to *Concepcion*, he endorsed its application in other cases, *id.* at 9, reinforcing the idea that forum can affect outcome. CROA precludes that from happening. It protects the right to sue, which, specifically under the statute and in general under operation of law, permits class actions. Congress precluded consensual agreements that alter the specific right granted in CROA and under the default rules of courts.

In *Concepcion* this Court emphasized the outcome-determinative nature of choice of arbitral versus judicial forum in class actions:

> [C]lass arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go

> uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, *see, e.g., Kohen* v. *Pacific Inv. Mgmt. Co. LLC*, 571 F. 3d 672, 677–678 (CA7 2009), and class arbitration would be no different.

131 S. Ct. at 1752. The Court concluded, "Arbitration is poorly suited to the higher stakes of class litigation." *Id.*

Congress foretold this Court's finding regarding the awkward fit of class actions into the arbitral forum: it granted the right to bring class actions under CROA in courts, and it precluded waiver of that right. It unambiguously stated that the arbitral forum was not appropriate for claims under the Act.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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August 15, 2011

No. 10-948

IN THE

Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,

Petitioners,

v.

WANDA GREENWOOD *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I, John Vail, a member of the Bar of this Court, certify that the accompanying document, Brief of Amicus Curiae of the American Association for Justice In Support of Respondents, contains 3,595 words, excluding the parts of the documents that are exempted by Supreme Court Rule 33.1(d).

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CERTIFICATE OF SERVICE

I, John Vail, a member of the Bar of this Court, hereby certify that on this 15th day of August, 2011, three copies of the Brief of Amicus Curiae the American Association for Justice In Support of Respondents, in the above-entitled case were sent via United Parcel Service for two day delivery, to counsel listed below. I further certify that all parties required to be served have been served.

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AMICUS CURIAE BRIEF

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On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS AND FOR REVERSAL OF THE NINTH CIRCUIT'S JUDGMENT

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, the Consumer Data Industry Association ("CDIA") provides the following disclosure.

CDIA is a trade association. No publicly held company owns 10% or more of CDIA stock.

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners, CompuCredit Corporation and Synovus Bank (*hereinafter*, collectively, "CompuCredit").

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information products and services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies in the marketplace. CDIA is the largest trade association of its kind in the world.

CDIA is vitally interested in the outcome of this appeal because the Ninth Circuit Court of Appeals' ("Ninth Circuit") decision undermines the

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[1] The parties have filed blanket consent letters with the Court concerning the filing of *amicus* briefs. Therefore, under Rule 37.3(a), all parties have consented to the filing of CDIA's *amicus* brief. CDIA understands that the parties' blanket consent letters are on file with the Clerk of Court.

As required by Rule 37.6, CDIA states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

enforceability of binding arbitration agreements and imposes unnecessary costs on CDIA's members in cases in which plaintiffs allege claims under the Credit Repair Organizations Act ("CROA") to avoid agreed-upon arbitration.

The court's decision directly impacts many of CDIA's members who provide credit-related information products and services (*e.g.*, credit monitoring) in interstate commerce and rely upon the enforceability of arbitration agreements subject to the Federal Arbitration Act ("FAA").

SUMMARY OF THE ARGUMENT

Left uncorrected, the Ninth Circuit's decision undermines the strong Congressional policy favoring arbitration that is expressed in the FAA. By misreading CROA's consumer notice requirement to provide consumers with a right to sue and interpreting that right to make courts the *exclusive* forum for consumers' CROA claims, the Ninth Circuit's decision prohibits the enforcement of written arbitration agreements if a plaintiff merely alleges a CROA violation. Because CROA's actual language does not preclude the waiver of court-based remedies through binding arbitration agreements, the Ninth Circuit's decision represents a return to the judicial hostility to arbitration that the FAA was enacted to overcome.

Many providers of credit-related education products and services, such as credit monitoring, rely

upon the enforceability of arbitration agreements to predictably manage their litigation costs. If those agreements cannot be enforced and if the providers must contend with the prospect of having to participate in court-based litigation to resolve consumer disputes, many providers may either exit the business or pass along the costs of these uncertainties to consumers through higher prices for their products and services. Because the federal government has recognized that the private sector is perhaps the most efficient provider of credit-related information products and services that promote consumer financial literacy,[2] the Ninth Circuit's decision will also harm the very consumers the Ninth Circuit purports to protect through its interpretation of CROA's anti-waiver provision.

To restore the strong federal policy favoring arbitration and to avoid the harm to consumers and to the providers of credit-related information products and services that will result from the Ninth Circuit's decision, this Court should reverse the Ninth Circuit's judgment.

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[2] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (*hereinafter*, "FTC, *Report to Congress*") at 76-77 (Dec. 2004) available at http://www.ftc.gov/reports/facta/041209factarpt.pdf. *Id.* at 77.

ARGUMENT

Because the Ninth Circuit's judgment undermines the enforceability of binding arbitration agreements relied upon by the providers of credit-related information products and services, such as credit monitoring, who rely upon the enforceability of such agreements, CDIA provides its separate brief to explain the impact of the Ninth Circuit's decision upon businesses that have relied upon such agreements in providing valuable credit-related information products and services to consumers.

I. THE NINTH CIRCUIT'S JUDGMENT UNDERMINES THE EXPRESSED INTENT OF CONGRESS THAT ARBITRATION AGREEMENTS AFFECTING INTERSTATE COMMERCE BE ENFORCED.

This Court has described the "basic purpose" of the FAA[3] as "overcom[ing] courts' refusal to enforce agreements to arbitrate," and Congress' motivation for the FAA, as "first and foremost," to change the courts' anti-arbitration rule.[4] More recently, this Court has made clear that: "The 'principal purpose'

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[3] 9 U.S.C. § 2 ("A written provision in any . . . contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

[4] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995).

of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"[5] According to this Court, "in enacting the FAA, [Congress] took pains to utilize as much power as it could" under the Commerce Clause.[6] When any federal court considers whether Congress intended to preclude arbitration, this Court explained that the court should keep in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[7]

The Ninth Circuit's decision acknowledges that Congress "manifested a 'liberal federal policy favoring arbitration agreements'" in the FAA,[8] and that a party "should be held" to "the bargain to arbitrate" a dispute absent an "evinced" intention of Congress to preclude the waiver of court-based remedies.[9] The court even recites this Court's well-settled rule that the party opposing arbitration bears the burden "to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."[10]

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[5] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2011).

[6] *Dobson*, 513 U.S. at 275.

[7] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (2000).

[8] *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1207 (9th Cir. 2010).

[9] *Id.* (quoting from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

[10] *Id.*

Despite the Ninth Circuit's acknowledgment of the above interpretive principles, and its recognition that plaintiffs agreed in writing to submit their claims to arbitration,[11] the court nonetheless held that the parties' arbitration agreement was void because the plaintiffs alleged CROA claims against CompuCredit.[12] For the court, plaintiffs overcame Congress' strong policy favoring arbitration simply by alleging a CROA claim.[13]

The Ninth Circuit reached its conclusion after framing the dispositive issue in a way that could lead only to a result that is contrary to this Court's FAA precedent and is unsupported by CROA's actual language:

> This appeal presents the question of whether the word "sue" as used in the Credit Repair Organization Act ("CROA") means "arbitrate." Or, perhaps the question is, as Alice put it: "whether you can make words mean many different things?"[14]

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[11] 9 U.S.C. §§ 2, 3.

[12] *Greenwood*, 615 F.3d at 1210.

[13] *Id.* Because neither the district court, nor the Ninth Circuit, reached the issue of whether CompuCredit was a credit repair organization subject to CROA, plaintiffs' mere allegation of a CROA claim was sufficient for the Ninth Circuit to overcome Congress' strong policy favoring arbitration as expressed in the FAA. *Id.* at 1208 n. 3.

[14] *Id.* at 1205 (*citing* Lewis Carroll's *Through the Looking Glass and What Alice Found There*).

The court's errant holding necessarily followed: "We conclude that Congress meant what it said in using the term "sue," and that it did not mean "arbitrate."[15]

The Ninth Circuit's decision represents the very "judicial hostility to arbitration agreements" that the FAA was intended to reverse.[16] To avoid a result that the Ninth Circuit characterized as "unhealthy"[17] – the compelled arbitration of the plaintiffs' claims – the court undermined the Congressional policy favoring arbitration, ignored this Court's decisions interpreting the FAA, and misinterpreted the language of CROA to create a new rule: courts are the exclusive forum for consumers' CROA claims.

II. CROA DOES NOT PROHIBIT BINDING ARBITRATION AGREEMENTS.

This Court has explained that, to avoid compelled arbitration, the opponent must demonstrate that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue."[18] That intent must be "deducible" from the text of the statute, the legislative history, or from an inherent

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[15] *Id.*

[16] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225 (1987).

[17] *Greenwood*, 615 F.3d at 1211.

[18] *McMahon*, 482 U.S. at 226-27.

conflict between arbitration and the statute's underlying purpose.[19]

Having concluded that the "plain language of the CROA prohibits enforcement of the arbitration agreement," the Ninth Circuit did not consider CROA's legislative history.[20] The "plain language" relied upon by the court was a single sentence found in the middle of a lengthy consumer notice required by CROA that is entitled "Consumer Credit File Rights Under State and Federal Law."[21] The relevant sentence informs consumers that: "You have a right to sue a credit repair organization that violates the Credit Repair Organizations Act."[22] The Ninth Circuit's decision converts this notice language into a substantive "right" under CROA.[23] The court's added gloss is that courts are the exclusive forum for the exercise of the consumer's "right to sue" because CROA's anti-waiver provision prohibits the waiver of any consumer protection or "right" provided by CROA.[24] For the Ninth Circuit, such a waiver occurs if a written arbitration agreement is enforced in a

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[19] *Id.*

[20] *Greenwood*, 615 F.3d at 1211 n. 4.

[21] *See*, 15 U.S.C. § 1679c.

[22] 15 U.S.C. § 1679c(a).

[23] *Greenwood*, 615 F.3d at 1210.

[24] *Id.* at 1209 ("The plain meaning of the 'right to sue' thus clearly involves the right to bring an action in a court of law.").

lawsuit involving a consumer's CROA claim.[25] This Court reached a different conclusion in considering a similar issue:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. *See Wilko v. Swan*, [346 U.S. 427 (1953)]. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.[26]

CROA's plain language contradicts, rather than supports, the Ninth Circuit's decision. CROA's anti-waiver statute provides, in part, that:

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[25] *Id.* at 1210 ("The extremely broad anti-waiver provision in the CROA protects the enumerated 'right to sue' by treating as 'void [a]ny waiver by any consumer of any protection provided or *any right* of the consumer under [CROA].") (emphasis in original).

[26] *Mitsubishi Motors*, 473 U.S. at 628.

> Any waiver by any consumer of any protection provided by or *any right of the consumer* under this title –
>
> (1) *shall be treated as void*; and
>
> (2) may not be enforced by any Federal or State court *or any other person*.[27]

The language of the anti-waiver provision (*i.e.*, "or any other person") demonstrates that courts are not the *exclusive* forum for a consumer's CROA claim because a person *other than* a Federal or State court – perhaps an arbitrator – may be called upon to consider the enforceability of an agreement under CROA's anti-waiver provision, such as an agreement to arbitrate disputes. At a minimum, the "any other person" language of the anti-waiver provision was sufficient to create a doubt as to the scope of the arbitrable issue that this Court requires be resolved *in favor of*, and not against, arbitration.[28]

By reading the language of CROA's required consumer *notice* into the language of CROA's anti-waiver provision, the Ninth Circuit found a Congressional "proclamation" – where none exists – that CROA prohibits arbitration.[29] In doing so, the Ninth Circuit acknowledged its creation of a conflict with two sister circuits, the Third Circuit Court of Appeals

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[27] 15 U.S.C. § 1679f(a).

[28] *See, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

[29] *Greenwood*, 615 F.3d at 1211.

("Third Circuit")[30] and the Eleventh Circuit Court of Appeals ("Eleventh Circuit").[31] According to the Ninth Circuit, her sister circuits' decisions were unpersuasive because they "give surprisingly little regard to the 'right to sue' language" in CROA.[32]

CROA provides a mechanism by which consumers may recover from credit repair organizations that violate CROA, a mechanism found in CROA's civil liability provision, not in the consumer notice provision.[33] Admittedly, the civil liability provision contemplates that a consumer may bring a CROA claim in a court.[34] It does not, however, make courts the *exclusive* forum in which CROA claims may be brought.[35] Because CROA's actual language does not prohibit arbitration or make courts the exclusive forum for such claims, the Third and Eleventh Circuits had little trouble concluding that CROA's anti-waiver provision does not prohibit the enforcement of arbitration agreements.[36]

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[30] *Gay v. CreditInform*, 511 F.3d 369 (3rd Cir. 2007).

[31] *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009).

[32] *Greenwood*, 615 F.3d at 1211.

[33] *Compare* 15 U.S.C. § 1679c(a) *with* § 1679g(a).

[34] 15 U.S.C. § 1679g(a)(2)&(b) (describing the court's discretion to award punitive damages and the factors a court may consider when making such an award).

[35] *See*, 15 U.S.C. § 1679g(a)(1).

[36] *Picard*, 564 F.3d at 1255; *Gay*, 511 F.3d at 381-382.

Rather than give effect to the strong Congressional policy favoring arbitration by following this Court's admonition that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," the Ninth Circuit turned the requirement on its head, concluding that to enforce an arbitration agreement under such circumstances, "strikes the court as embracing an *unhealthy* regard for the policy favoring arbitration."[37]

III. THE NINTH CIRCUIT'S JUDICIAL HOSTILITY TO ARBITRATION WILL RESULT IN THE UNNECESSARY EXPENDITURE OF LITIGANT AND JUDICIAL RESOURCES.

For the Ninth Circuit, it is irrelevant whether or not a defendant is actually a credit repair organization.[38] The mere allegation of a CROA claim is sufficient to defeat a motion to compel arbitration.

Under the Ninth Circuit's approach to the enforcement of arbitration agreements, discovery could reveal facts upon which a defendant could rely in a summary judgment motion to establish that it is not

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[37] *Greenwood*, 615 F.3d at 1211 (emphasis in original); *see also, Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25 ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

[38] *Greenwood*, 615 F.3d at 1208 n. 3 (acknowledging that the issue of whether CompuCredit is actually a credit repair organization subject to CROA's anti-waiver provision was never reached).

a credit repair organization. In such circumstances, CROA's anti-waiver provision, as interpreted by the Ninth Circuit, could not possibly apply to the parties' arbitration agreement because the court held that a consumer's "right to sue" exclusively in a court is found in the consumer notice provision.[39]

If this Court does not reverse the Ninth Circuit's judgment, then if summary judgment were granted to a defendant on a plaintiff's CROA claim because the defendant established that it was not a credit repair organization, the district court that previously denied a defendant's motion to compel arbitration would, under the FAA, have to stay proceedings and compel the arbitration of the consumer's remaining claims at some distant future point in the litigation, perhaps after the close of discovery and shortly before trial. Such an approach is demonstrably at odds with the Congressional policy favoring arbitration set forth in the FAA. It is also inconsistent with this Court's views concerning the desirability of agreed-upon arbitration:

> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable,

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[39] 15 U.S.C. § 1679c ("You have the right to sue a *credit repair organization* that violates the Credit Repair Organizations Act.") (emphasis added).

> reducing the cost and increasing the speed of dispute resolution.[40]

Reversing "judicial hostility to arbitration agreements" was the purpose underlying the FAA.[41] This Court should reverse the Ninth Circuit's decision to further this goal. Further, as established in the petitioners' brief, this Court's reversal of the Ninth Circuit's judgment is essential to permit the parties to lawsuits involving CROA claims to attempt to settle their disputes. Absent such a reversal, a CDIA member's offer to settle a threatened or existing CROA claim could be an "attempt . . . to obtain a waiver from a consumer" of the "right to sue" found by the Ninth Circuit in the required consumer notice. Such an "attempt" could then subject the member attempting to settle the claim to civil liability under CROA.[42]

Absent a reversal of the Ninth Circuit's decision, the parties to lawsuits involving CROA claims may be prevented from settling such claims. Moreover, the courts considering such claims may be required to expend their limited resources to manage cases that, pursuant to the parties' agreement should have been referred to arbitration.

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[40] *Concepcion*, 131 S.Ct. at 1749 (*citing*, *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009)).

[41] *McMahon*, 482 U.S. at 225.

[42] 15 U.S.C. §§ 1679f(b), 1679g(a).

IV. THE NINTH CIRCUIT'S DECISION HARMS THE VERY CONSUMERS CROA WAS INTENDED TO PROTECT.

To provide consumers with the tools to protect themselves from the credit-related harm caused by credit fraud and identity theft, Congress amended the Fair Credit Reporting Act in 2003 to permit consumers to place fraud alerts in their consumer reporting agency files,[43] block the reporting of information resulting from identity theft,[44] and require consumer reporting agencies to provide a summary of identity theft victim rights to consumers who report identity theft.[45]

The value and efficacy of these consumer protection tools depends upon the consumer's ability to obtain and understand credit-related information. Making this information available to consumers or even proactively informing consumers when a review of their consumer report file could be beneficial, is a role being filled by the private sector through the provision of credit-information products, including credit monitoring.

The Federal Trade Commission, which enforces CROA and the FCRA, explained that, as consumer financial literacy improves, consumers have begun to recognize the importance of consumer report

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[43] 15 U.S.C. § 1681c-1.

[44] 15 U.S.C. § 1681c-2.

[45] 15 U.S.C. § 1681g(c).

information, and private sector providers have responded by making credit monitoring and related products and services available to consumers.[46] Today, there are dozens of such providers. Their products can include: (1) one or more periodically updated credit scores; (2) consumer reports throughout the year; (3) identity theft prevention materials; (4) periodic email, telephone, or mail updates concerning consumer report file activity; (5) access to proprietary credit education materials; and (6) a central location providing links to governmental and industry websites providing additional credit-related information.

The businesses providing consumers with credit-related products and services are able to charge affordable prices, in part, because arbitration agreements permit them to predictably manage their litigation costs for any disputes related to their products and services. If, as the Ninth Circuit has held, the mere allegation of a CROA claim is sufficient to void an arbitration agreement, the availability of credit information products and services could be reduced or even eliminated. It will almost certainly be more expensive for consumers.

CDIA submits that, properly read, CROA's consumer notice and anti-waiver provisions should not be interpreted in a way that will harm consumers by voiding arbitration agreements with the result that the credit-related products and services relied upon

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[46] FTC, *Report to Congress* at 76-77.

by consumers may be eliminated or their cost increased.

CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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June 30, 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 10-948

In the Supreme Court of the United States

COMPUCREDIT CORPORATION AND SYNOVUS BANK,
PETITIONERS

v.

WANDA GREENWOOD, *ET AL.*, RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether claims arising under the Credit Repair Organizations Act, 15 U.S.C. § 1679 *et seq.*, are subject to arbitration pursuant to a valid arbitration agreement.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Under the Federal Arbitration Act ("FAA"), an agreement to arbitrate is enforceable just like any other contract. This is no less true with respect to *statutory* claims, except where Congress has demonstrated otherwise.

In light of the strong federal policy supporting arbitration, Congress knows it must speak clearly if it intends to preclude agreements requiring arbitration of statutory claims. When Congress has not made any contrary intention clear, however, parties to commercial arbitration agreements expect that their agreements will be enforced. In reliance on these expectations, countless businesses and individuals have incorporated arbitration clauses into their commercial contracts. Congress intentionally fostered this pro-arbitration climate in the FAA and would not overrule it lightly.

The Ninth Circuit's decision in this case strikes a blow against these settled expectations. The Credit Repair Organizations Act ("CROA") does not mention arbitration at all. Still, based largely on inferences drawn from its reading of the statutory phrase "right to sue," the Ninth Circuit held that claims under the CROA are not subject to arbitration. Both the outcome of this decision and the analysis underlying it

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than DRI, its members, and its counsel made any financial contribution to the brief's preparation or submission. The parties have consented to the submission of this brief. Letters of consent from both parties are on file with the Clerk.

are inconsistent with the clear, pro-arbitration expectations fostered by Congress in the FAA.

Amicus curiae DRI submits this brief to discuss this important issue from the perspective of civil defense lawyers and the clients they represent. DRI is an international organization of attorneys defending the interests of businesses and individuals in civil litigation. DRI frequently participates as an *amicus curiae* in this Court and elsewhere in cases of interest to its membership. Arbitration agreements are of great importance to the business dealings of many of DRI's members and clients. In the interest of predictability—and in deference to the clear federal policy favoring arbitration—DRI urges this Court to ensure that parties to arbitration agreements continue to receive the benefits of their bargains when the claim at issue arises from a statute that evinces no clear congressional intent to preclude arbitration.

STATEMENT

Petitioners market and service a credit card called Aspire Visa. Pet. App. 3a. When consumers apply for this card, they agree to arbitrate "[a]ny claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to" their credit card accounts. *Id.* at 5a.

In 2008, a group of cardholders brought an action in the district court alleging, among other things, violations of the CROA. Petitioners moved to compel arbitration of these claims pursuant to the parties' agreements. The district court denied the motion, holding that the CROA grants consumers the "right to sue" and provides that this right cannot be waived. *Id.* at 45a.

The Ninth Circuit affirmed. Like the district court, it relied on the CROA's disclosure provisions, which require credit repair organizations to inform consumers of their "right to sue." Pet. App. 9a (quoting 15 U.S.C. § 1679c(a)). Also like the district court, the Ninth Circuit relied on the CROA's statement that "[a]ny waiver by any consumer of any protection * * * or any right" is void. *Ibid.* (quoting 15 U.S.C. § 1679f(a)). Therefore, the Ninth Circuit reasoned, Respondents enjoyed a nonwaivable right to proceed in court. As Petitioner has shown, the Ninth Circuit's decision creates a sharp and acknowledged split of authority with the Third and Eleventh Circuits, both of which have held that claims under the CROA can be made the subject of a predispute arbitration agreement. Pet. 10-14; see also Pet. App. 17a (majority noting, "[w]e realize this decision is in conflict with that of two of our sister circuits").

Judge Tashima dissented, emphasizing that the CROA's disclosure provisions do not create any substantive rights but depend for their content on separate, substantive provisions. Pet. App. 25a. In particular, 15 U.S.C. § 1679g provides that "[a]ny person who fails to comply with any provision of this subchapter with respect to any other person shall be liable to such person." As Judge Tashima noted, however, "[n]owhere in the CROA * * * does Congress mandate a judicial forum for enforcement of the CROA's substantive provisions." Pet. App. 26a. Moreover, the "'right to sue' does not necessarily mean the right to sue *in court*." *Id.* at 27a (emphasis in original). He concluded: "We should not lightly create a circuit split on an issue of national application on the basis of the flimsy evidence on which the majority relies." *Id.* at 27a-28a.

SUMMARY OF ARGUMENT

Since the enactment of the FAA, Congress has recognized—and this Court has honored—a strong federal policy in favor of arbitration. Consistent with that policy, a wide variety of businesses have made arbitration agreements central to their commercial contracts. As with any contract, the parties to these agreements have a well-founded expectation that their agreements will be enforced.

With that strong federal policy in mind, this Court has long held that an agreement to arbitrate a statutory claim will be enforced unless Congress says otherwise. Indeed, Congress has, on several occasions, demonstrated its willingness to express such an intention. Each time, it has done so in clear and specific terms.

The CROA does not mention arbitration, much less express Congress's intention to make it unavailable. Yet the Ninth Circuit has nevertheless concluded that claims under the CROA are not subject to arbitration. Both this result and the analysis that produced it are inconsistent with this Court's precedent and Congress's policy favoring arbitration.

The Ninth Circuit's decision turns almost entirely on its reading of the statutory phrase "right to sue." But that phrase does not presume a judicial forum. In fact, the CROA's reference to a "right to sue" appears in a provision about *disclosure obligations* and refers to rights created in a separate civil liability provision that in no way precludes arbitration. Consistent with Congress's clear direction in the FAA, this Court has repeatedly enforced arbitration agreements in the face of statutory reservations of rights far more explicit than the ones at issue here—

including statutes that reserve the right to bring "a civil action in any court of competent jurisdiction." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (interpreting 29 U.S.C. § 626(c)(1)).

To be sure, a plaintiff under the CROA, like any other plaintiff asserting a federal cause of action, ordinarily enjoys a right to proceed in court under 28 U.S.C. § 1331. But this Court has repeatedly made clear that federal statutory causes of action that *could* be resolved in court may also be committed to arbitration if the parties so agree. The CROA's non-waiver provision does not support a contrary result.

In the interest of protecting the settled expectations of parties to commercial contracts, it is critical that this Court remain faithful to Congress's policy favoring arbitration. That policy necessarily impacts the interpretation of any statute that gives rise to a federal claim. To that end, DRI urges this Court to reverse the Ninth Circuit's decision.

ARGUMENT

I. As this Court has consistently recognized, Congress has adopted a strong federal policy in favor of arbitration.

Just last Term, this Court recognized once again that it is "beyond dispute that the FAA was designed to promote arbitration." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1749 (2011). In the FAA, Congress provided that an agreement "to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. In doing so, Congress intended "to overrule the judiciary's longstanding refusal to enforce agreements to arbi-

trate" and place arbitration agreements "'upon the same footing as other contracts.'" *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

The FAA thus manifests "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Issues "of arbitrability must be addressed with a healthy regard for [this] federal policy favoring arbitration." *Ibid.*

This policy applies with equal force in the context of statutory claims. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Accordingly, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25. If the defense in question is that the statutory claims at issue cannot be arbitrated, "the burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987). The default position, then, is always in favor of arbitration.

II. Congress's endorsement of arbitration is reflected in the settled expectations of businesses and consumers alike.

With Congress's forceful endorsement as a backdrop, arbitration has become central to a wide range of commercial agreements. Businesses rely on these predispute agreements to lower their costs; arbitration procedures can be designed "to allow for efficient, streamlined procedures tailored to the type of dispute," and their informality can "reduc[e] the cost and increas[e] the speed of dispute resolution." *Concepcion*, 131 S. Ct. at 1749. This savings is then passed on to consumers, who have settled expectations of their own. Cf. *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991) (stating that "passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued"); see also Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 90 (identifying seven possible ways in which arbitration may reduce costs for businesses).

Empirical studies confirm that these agreements are widely used. According to Fulbright & Jaworski LLP, which surveyed 275 American companies across a variety of industries, about a third of the respondents preferred arbitration to litigation in domestic disputes, including over a third of the respondents in the energy, financial services, health care, and insurance industries. Fulbright & Jaworski LLP, *Fulbright's 7th Annual Litigation Trends Survey Report* 19 (2010). Another study notes that the American Arbitration Association ("AAA") closed

3,220 consumer arbitrations between 2005 and 2007. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 868 (2010). The authors estimate that consumers were claimants in 85 percent of these cases. *Id.* at 872.

Arbitration agreements are beneficial in any setting that may give rise to a dispute, and thus they are by no means confined to the consumer context. One study of franchise agreements found that nearly half of the sample contained an arbitration clause. This number has remained steady for nearly ten years. Christopher R. Drahozal & Quentin R. Whittrock, *Is There a Flight from Arbitration?* 37 Hofstra L. Rev. 71, 75 (2008). And a study of 551 employment contracts for Chief Executive Officers found that *half* contained an arbitration clause. When the sample was broken down by year, the study revealed that, but for a small dip in 2004, arbitration clauses had become more common every year since 1999, appearing in 60.4% of contracts executed in 2005. Randall Thomas et al., *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 Vand. L. Rev. 959, 981 (2010). Further, twenty-seven percent of American respondents to the Fulbright & Jaworski study require arbitration of employment disputes in non-union settings. Fulbright & Jaworski, *supra*, at 43.

Arbitration is favored in part because it is generally faster and less expensive than traditional in-court litigation. According to government statistics, the median time from filing to disposition of civil cases in the twelve-month period ending March 31, 2010, was 23.3 months for cases disposed of by trial, and 8.2 months overall. Administrative Office of the

United States Courts, *Federal Judicial Caseload Statistics: March 31, 2010*, Table C-5 (2010). By contrast, according to a study of 301 AAA consumer arbitrations administered in 2007, the average time from filing to final award was 6.9 months—an improvement of nearly 20 percent over court cases resolved without trial, and a 70 percent improvement over those that are tried. Drahozal & Zyontz, *supra*, at 845.

Nor is there any doubt that a consumer's substantive rights can be vindicated in a meaningful way in an arbitral forum. According to the AAA's analysis of 987 consumer-initiated arbitrations resolved in 2006, the consumer was awarded some relief in 48 percent of the cases. *Id.* at 920. In the above-referenced study of cases from 2007, consumers won some relief in 128 of the 240 consumer-initiated cases in the sample. *Id.* at 897.[2] According to a study of arbitrations conducted by the National Arbitration Forum, consumers prevailed in 53 of 97 consumer-initiated cases that reached decision. *Id.* at 924 (citing Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004)). Another study of NAF arbitrations found that consumers prevailed in 65.5 percent of consumer-initiated cases that reached decision. *Id.* at 923 (citing Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Out-*

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[2] This study also reveals the cost-effective nature of arbitration from the consumer's perspective. In these cases, "[c]onsumer claimants seeking less than $10,000 were assessed an average of $1 in AAA administrative fees and $95 in arbitrator's fees." Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 916 (2010).

comes, Metropolitan Corporate Counsel 32 (July 2006)).

In short, businesses have responded to the FAA by relying heavily on arbitration in their commercial agreements, and both businesses and consumers have enjoyed benefits as a result. Like any party to a contract, businesses expect that their agreements will be enforced. Consumers and employees share this expectation and enjoy direct and indirect benefits on that basis, including lower prices, higher pay, faster and lower-cost dispute resolution, and increased predictability. Any change in this Court's approach to arbitrability—whether in terms of the scope of arbitration clauses or in the analysis of the arbitrability of statutory claims—would disturb those longstanding and settled commercial expectations.

III. The Ninth Circuit's willingness to read the CROA to bar arbitration is at odds with the strong federal policy favoring arbitration, as expressed in the FAA and this Court's jurisprudence.

In view of this strong federal policy favoring arbitration, the Ninth Circuit's approach to the CROA cannot stand. This Court has held that a party who has agreed to arbitrate "should be held to [the agreement] unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors*, 473 U.S. at 628. And, in fact, when Congress has chosen to preclude arbitration for a particular statutory right, it has expressed that intention quite clearly.

As discussed below and in the brief by Petitioners, the CROA expresses no such intention. Although it does require credit repair organizations to disclose to

consumers that they have a "right to sue," that provision does not confer any substantive rights, nor does it require that the suit be brought in a judicial forum. Indeed, the Ninth Circuit's approach to the phrase "right to sue" is in tension with the FAA's approach of recognizing arbitration as an adequate alternative for vindicating substantive rights. And the CROA's non-waiver provision does not change the analysis. For all these reasons, faithful adherence to the FAA and this Court's precedents on arbitration requires reversal of the Ninth Circuit's decision here.

A. Congress has made explicit reference to arbitration in other statutes, but it has made no such reference in the CROA.

Whether a statutory claim is subject to arbitration is a question of congressional intent—as expressed not only in the underlying statute but also in the FAA itself. Congress is undoubtedly "aware of existing law" when it passes new statutes, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (internal quotation marks and citation omitted), and it knows that its enactments will be interpreted in accordance with the FAA. In light of the FAA, the "burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227.

In determining Congress's intent with respect to any particular statutory right, there is no need to guess. Congress has repeatedly demonstrated that it can and will make its "intention" clear when it prefers a judicial forum. For example, in one enactment, Congress expressly limited the ability of motor ve-

hicle franchisors and franchisees to agree on arbitration in advance:

> Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy *only if after such controversy arises* all parties to such controversy consent in writing to use arbitration to settle such controversy.

15 U.S.C. § 1226(a)(2) (emphasis added). This law was proposed, with substantially similar language (including the same explicit reference to arbitration), in 1998, just two years after the enactment of the CROA. Motor Vehicle Franchise Control Arbitration Fairness Act of 1998, S. 2434, 105th Cong. (1998).

Similarly, Congress has demonstrated an intent to preclude certain defense contractors from entering into predispute arbitration agreements with their employees.[3] It has required that any such contractor refrain from requiring "as a condition of employment, that the employee or independent contractor *agree to resolve through arbitration any claim* under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention." Department of Defense Appropriations Act, 2010, Pub. L. 111-118, §

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[3] This provision applied to a contract in excess of $1,000,000 that is awarded more than 60 days after the effective date for the Act. Pub. L. 111-118, § 8116(a), 123 Stat. 3409, 3454 (2009).

8116(a)(1), 123 Stat. 3409, 3454 (2009) (emphasis added).

In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress included several different provisions referring explicitly to predispute arbitration agreements. Congress explicitly prohibited predispute agreements to arbitrate claims arising under Sarbanes-Oxley's whistleblower retaliation provision:

> (2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

Pub. L. 111-203, Title IX, § 922 (a), 124 Stat. 1376, 1841 (2010) (18 U.S.C. §1514A(e)(2)).

Further, the Act explicitly grants the Consumer Financial Protection Bureau authority to restrict certain predispute arbitration agreements:

> The Bureau, by regulation, may prohibit or impose conditions or limitations on *the use of an agreement* between a covered person and a consumer for a consumer financial product or service *providing for arbitration of any future dispute between the parties*, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.

Pub. L. 111-203, § 1028, 124 Stat. 1376, 2004 (2010) (12 U.S.C. § 5518(b)) (emphasis added). The Act grants similar authority to the SEC:

> The Commission, by rule, may prohibit * * * agreements that require customers or clients of any [broker, dealer, municipal securities dealer or investment adviser] *to arbitrate any future dispute* between them arising under the Federal securities laws * * *

Pub. L. 111-203, §§ 921(a),(b), 124 Stat. 1376, 1841 (15 U.S.C. § 78o(o), 15 U.S.C. § 80b-5(f)) (emphasis added).

Even arbitration's most vociferous opponents recognize the need to speak clearly. The proposed Arbitration Fairness Act would amend the FAA to provide that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute." S. 987, 112th Cong. § 3 (2011). Accordingly, those who seek to restrict predispute arbitration agreements are not content to rely on oblique measures; they recognize that a limitation on arbitration cannot be based on a mere inference.

The numerous statutory provisions explicitly referencing arbitration demonstrate that Congress knows how to preclude agreements such as the one at issue here. But the unambiguous language in these other enactments and proposals is nowhere to be found in the CROA. Cf. *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1071 (2011) (explaining that a statute's failure to mention a "classic and well known" basis for liability must be a matter of "deliberate choice, not inadvertence") (internal quotation marks and citation

omitted). The CROA *nowhere* mentions arbitration, and nothing in the ordinary meaning of the words "right to sue," or in the structure of the CROA, indicates that Congress intended to bar arbitration when it passed this statute.

B. In comparison to these other statutes, the CROA—with its phrase "right to sue"—does not express a congressional intent to bar arbitration.

In sharp contrast with the statutes discussed above, the CROA says nothing at all about arbitration. Further, although the CROA requires that a consumer be told he or she has "a right to sue," it neither specifies nor implies the *forum* in which the suit must be brought. The statute's liability provision—the provision that actually confers the right to sue—does not reference a forum either.

The Ninth Circuit assumed that the words "right to sue" necessarily implied a right to a judicial forum. See Pet. App. 12a (reasoning that, if arbitration were permitted, then the CROA would "requir[e] that consumers be told a lie: that they possessed a nonexistent right"); see also Resp. Br. Opp. 17 (contending that the disclosure provision is a specific provision that controls the more general liability provision).

But even if this reading is "plausible enough in the abstract," the statute must be read in harmony with two important background principles embodied in the FAA. Cf. *Bd. of Trustees* v. *Roche Molecular Sys., Inc.*, No. 09-1159, 563 U.S. ___, slip. op. at 10 (June 6, 2011) (interpreting Bayh-Dole Act with reference to background principles). First, doubts about arbitrability must be resolved in *favor* of arbitrabili-

ty. *Moses H. Cone*, 460 U.S. at 24-25. Therefore, congressional intent to preclude arbitration must be unambiguous, at least where such intent is based on the statute's text. And second, an agreement to arbitrate "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Because the consumer's right to relief under the CROA is fully protected, regardless of forum, there is no reason to think that a "right to sue" requires that the consumer's claim be resolved in court.

The opinions of this Court are consistent with this interpretation of the phrase "right to sue." On its face, the phrase refers only to a right of action and is in no way inconsistent with arbitration. This Court has used the phrase "right to sue" in reference to rights of action under both Title VII and the Age Discrimination in Employment Act ("ADEA"). See *Thompson* v. *North American Stainless, LP*, 131 S. Ct. 863, 869 (2011) ("We have suggested in dictum that the Title VII aggrievement requirement conferred a right to sue on all who satisfied Article III standing."); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 403-404 (2008) ("The [ADEA] requires the aggrieved individual to file a charge before filing a lawsuit; it does not condition the individual's right to sue upon the agency taking any action."); cf. *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228, 245 n.2 (2005) (Scalia, J., concurring) ("The EEOC need not take the extra step of recognizing that individuals harmed by prohibited actions have a right to sue; the ADEA itself makes that automatic."). Yet there is wide agreement that Title VII and ADEA claims may be committed to arbitration in predispute arbitration

agreements. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that ADEA claims are arbitrable); *EEOC* v. *Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 748-749 (9th Cir. 2003) (en banc) (collecting cases concluding that "Title VII does not bar compulsory arbitration agreements"). In short, the words "right to sue" are consistent with a predispute arbitration agreement because they imply nothing about the forum.

Not surprisingly, this Court's prior use of the phrase "right to sue" is also consistent with the ordinary meaning of the words. The word "sue" is defined simply as "to seek justice or right from (a person) by legal process." *Webster's Ninth New Collegiate Dictionary* 1179 (1988); see also *Funk & Wagnalls Standard College Dictionary* 1338 (1973) ("To institute proceedings against for the recovery of some right or the redress of some wrong"); *Shorter Oxford English Dictionary* 3095 (6th ed. 2007) ("Institute a suit for, make a legal claim to"); *Random House Webster's Unabridged Dictionary* 1900 (2d ed. 2001) ("[T]o institute a process in law against; bring a civil action against"). Arbitration is undeniably a "legal process"; it is used to vindicate legal rights and redress wrongs, and its awards are enforceable by law. Read in this commonsense way, the guarantee of a right to sue in no way limits the forum available. See Pet. App. 27a ("the mere mention of a 'right to sue' does not necessarily mean the right to sue *in court*") (Tashima, J., dissenting) (emphasis in original); *Picard* v. *Credit Solutions, Inc.*, 564 F.3d 1249, 1255 (11th Cir. 2009) ("Although CROA requires credit repair organizations to inform consumers of their right to a private cause of action, such does not preclude arbitration under CROA."); *Gay* v. *CreditInform*, 511 F.3d

369, 377 n.4 (3d Cir. 2007) (noting that "the section does not specify the forum for the resolution of the dispute").

The context of the phrase "right to sue" in the CROA itself further confirms that it does not specify or guarantee a judicial forum. According to the CROA, a credit repair organization must provide consumers with the following disclosures:

> You have a right to dispute inaccurate information in your credit report by contacting the bureau directly. * * *
>
> You have a right to obtain a copy of your credit report from the credit bureau.* * *
>
> You have a *right to sue* a credit repair organization that violates the Credit Repair Organization Act. This law prohibits deceptive practices by credit repair organizations.
>
> You have the right to cancel your contract with any credit repair organization for any reason within 3 business days from the date you signed it. * * *

15 U.S.C. § 1679c (emphasis added). Again, these disclosures simply have nothing to do with the *forum* for any dispute. The phrase "right to sue" is intermixed with descriptions of other substantive rights and informs the consumer only that she may personally sue to obtain a remedy if these rights are violated. Had Congress not required informing consumers of their "right to sue," the consumer might not know that he or she has a remedy at all.

This interpretation is consistent with the overall statutory structure. The disclosure provisions of the

CROA create the right to *be informed* of the right to sue; these provisions do not create the right to sue itself. The right of action itself is found in 15 U.S.C. § 1679g, which states that "[a]ny person who fails to comply with any provision of [the CROA] with respect to any other person shall be liable to such person." The statute nowhere precludes credit repair organizations from also telling consumers that, if they wish to form a contract, any suit under this provision must be brought before an arbitrator.

In requiring disclosure of a "right to sue" under the CROA, Congress was referring merely to the CROA's liability provisions, which grant consumers *a cause of action*—nothing more. There is no textual reason to conclude that consumers are also guaranteed *a judicial forum*. Substantive rights may be vindicated in arbitration just as they may be vindicated in court. Indeed, this Court has long recognized that when a party agrees to arbitrate, it "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Nothing in the CROA reflects any congressional judgment that an arbitral forum would somehow be inadequate for CROA claims in particular.

C. The non-waiver provision of the CROA does not prevent waiver of a consumer's ability to assert a CROA claim in court.

The non-waiver provision of the CROA does not require any different result. As the Petitioners' brief explains (at pp. 24-35), the non-waiver provision does not and cannot prevent waivers that relate only to *procedural* rights, such as the consumer's choice of

forum. And even if that were not so, a consumer's ability to file his claims in federal court is derived from federal statutes *outside* the CROA and thus is not subject to the CROA's non-waiver provision in the first place.

Although a consumer certainly *can* assert such a claim in federal court, his right to do so is the very same right enjoyed by every other federal plaintiff—a right set forth in 28 U.S.C. § 1331, which establishes federal question jurisdiction. Because this right is not created by the CROA itself, it is outside the scope of the CROA's non-waiver provision.

The CROA prohibits waiver of "any protection provided by or any right of the consumer under this subchapter." 15 U.S.C. § 1679f(a). But as the Third Circuit recognized, a plaintiff's *right to a judicial forum*, unlike the cause of action itself, "exist[s] outside of [the CROA]." *Gay*, 511 F.3d at 383 n.10. In other words, it is not a "protection provided by * * * this subchapter." 15 U.S.C. § 1679f(a). Rather, it is provided by the laws conferring and regulating the jurisdiction of the federal courts.

When Congress creates a new cause of action, it works against the background of 28 U.S.C. § 1331. This statute provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." It is this statute that empowers a plaintiff to bring his claims in federal court, because "federal courts have a 'virtually unflagging obligation' to exercise their jurisdiction." *Deakins* v. *Monaghan*, 484 U.S. 193, 203 (1988) (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 813 (1976)).

Because Congress obviously contemplated that federal courts would have jurisdiction over CROA claims, the statute's references to a "court" are not dispositive of any intent to preclude arbitration. See 15 U.S.C. § 1679g(a)(2)(A),(B) (referring to damages that "the court may allow"). If Congress were deemed to preclude arbitration whenever it contemplated that a claim *could* proceed in court, this Court's precedent would be turned on its head. Such a rule would require Congress to evince an affirmative intent *to allow* arbitration, because *all* federal claims may proceed in court. See *Gay*, 511 F.3d at 383 (noting that "identification of a court as a forum for an allegedly wronged party to seek relief adds nothing to the statute helpful to resolution of the issue before us"); see, *e.g.*, *McMahon*, 482 U.S. at 227 (statutory claim was arbitrable despite provision vesting jurisdiction in the "district courts of the United States").

In sum, for a CROA plaintiff, the only right to a *judicial* remedy comes from the background principles of 28 U.S.C. § 1331. That right is perfectly waivable because it is not a "protection provided by" or "right of the consumer under" the CROA. 15 U.S.C. § 1679f(a). Thus, the non-waiver provision of the CROA provides no impediment to an agreement to submit CROA claims to arbitration.

CONCLUSION

This Court has consistently honored the strong federal policy favoring arbitration, recognizing again and again that a claim is arbitrable unless Congress says otherwise. Both the outcome of this case below and the Ninth Circuit's approach to the issue of arbitrability of statutory claims are in conflict with this Court's precedent, as well as with Congress's en-

dorsement of arbitration. *Amicus* DRI urges this Court to reverse the decision below, preserving the settled expectations of countless parties to arbitration agreements.

Respectfully submitted.

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